

10-19-2010

# McCann v. McCann Clerk's Record v. 1 Dckt. 37547

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# LAW CLERK

Vol. 1 of 1

In the  
**SUPREME COURT**  
of the  
**STATE OF IDAHO**

Ronald R. Mc Cann,

Plaintiff/Appellant,

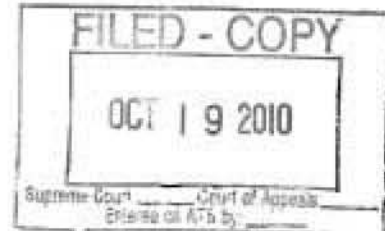
v.

William V. Mc Cann, Jr., et al,

Defendants-Respondents,

Mc Cann Ranch & Livestock Company, Inc.,

Nominal Defendant-Respondent.



**CLERK'S RECORD ON APPEAL**  
**Volume I**

Appealed from the District Court of the Second  
Judicial District of the State of Idaho, in and  
for Nez Perce County

Honorable George D. Carey, District Judge

Supreme Court No. 37547

Attorney for Plaintiff  
Timothy Esser

Attorney for Defendant  
Merlyn W. Clark

**SEE AUGMENTATION RECORD**

**37547**

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. MC CANN,	)	
	)	
Plaintiff-Appellant,	)	SUPREME COURT NO. 37547
	)	
v.	)	
	)	TABLE OF CONTENTS
WILLIAM V. MC CANN, JR. and GARY	)	VOLUME I
E. MEISNER, individually as a	)	
director of McCann Ranch &	)	
Livestock Company, and as a	)	
shareholder of McCann Ranch &	)	
Livestock, Inc., in his capacity	)	
of the William V. McCann, Sr.	)	
Stock Trust,	)	
	)	
Defendants-Respondents,	)	
	)	
MC CANN RANCH & LIVESTOCK COMPANY,	)	
INC.,	)	
	)	
Nominal Defendant-Respondent.	)	

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. MC CANN,	)	
	)	
Plaintiff-Appellant,	)	SUPREME COURT NO. 37547
	)	
v.	)	
	)	INDEX
WILLIAM V. MC CANN, JR. and GARY	)	VOLUME I
E. MEISNER, individually as a	)	
director of McCann Ranch &	)	
Livestock Company, and as a	)	
shareholder of McCann Ranch &	)	
Livestock, Inc., in his capacity	)	
of the William V. McCann, Sr.	)	
Stock Trust,	)	
	)	
Defendants-Respondents,	)	
	)	
MC CANN RANCH & LIVESTOCK COMPANY,	)	
INC.,	)	
	)	
Nominal Defendant-Respondent.	)	

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IN THE SUPREME COURT OF THE STATE OF IDAHO

RONALD R. MC CANN,	)	
	)	SUPREME COURT NO. 37547
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
WILLIAM V. MC CANN, JR. and GARY	)	
E. MEISNER, individually as a	)	
director of McCann Ranch &	)	
Livestock Company, and as a	)	
shareholder of McCann Ranch &	)	
Livestock, Inc., in his capacity	)	
of the William V. McCann, Sr.	)	
Stock Trust,	)	
	)	
Defendants-Respondents,	)	
	)	
MC CANN RANCH & LIVESTOCK COMPANY,	)	
INC.,	)	
	)	
Nominal Defendant-Respondent.	)	

CLERK'S RECORD

Appeal from the District Court of the Second Judicial District  
Of the State of Idaho, in and for the County of Nez Perce

BEFORE THE HONORABLE George D. Carey, DISTRICT JUDGE

Counsel for Appellant  
Timothy Esser  
Esser & Sandberg  
520 East Main St  
Pullman, WA 99163

Counsel for Respondent(s)  
Merlyn W. Clark  
Hawley Troxell Ennis & Hawley  
PO Box 1617  
Boise, ID 83701-1617

Ronald Robert McCann vs. William Vern McCann Jr, Gary E Meisner, McCann Ranch and Livestock Co.

Date	Code	User	Judge
6/10/2008	NCOC	PAM	New Case Filed-Other Claims
		PAM	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: McCann, Ronald R (plaintiff) Receipt number: 0315523 Dated: 6/10/2008 Amount: \$88.00 (Check) For: McCann, Ronald R (plaintiff)
	ATTR	PAM	Plaintiff: McCann, Ronald R Attorney Retained Timothy Esser
	COMP	DIANE	Complaint Filed
	FSUM	DIANE	Summons Filed
	FSUM	DIANE	Summons Filed
	FSUM	DIANE	Summons Filed
6/12/2008	ORDR	PAM	Order Regarding Disqualification of Judge Brudie
6/13/2008	ORAJ	TERESA	Order Assigning Judge--KERRICK
	DISF	TERESA	Disqualification Of Judge - Self KERRICK
	ORAJ	TERESA	Order Assigning Judge--STEGNER
6/19/2008	ORDR	JANET	Order setting status conf
	HRSC	JANET	Hearing Scheduled (Status Conference 06/30/2008 09:30 AM) by phone from Moscow, Judge place call
	AFSV	JANET	Affidavit Of Service (William McCann Jr
	AFSV	JANET	Affidavit Of Service (William McCann Jr as registered agent for McCann Ranch)
6/24/2008	MOTN	JANET	Motion for Disqualification without Cause (Stegner)
6/25/2008	ORDR	JANET	Order granting motion for disqualification (Judge Stegner)
	ORDR	JANET	Order vacating status conf
	HRVC	JANET	Hearing result for Status Conference held on 06/30/2008 09:30 AM: Hearing Vacated by phone from Moscow, Judge place call
	ORDR	JANET	Order Assigning Judge (Bradbury)
7/1/2008	NOTD	JANET	Notice Of Service-defendant
		JANET	Filing: I2 - Initial Appearance by persons other than the plaintiff or petitioner more than \$300, Not more than \$1000 Paid by: Michael McNichols Receipt number: 0316615 Dated: 7/1/2008 Amount: \$58.00 (Check) For: Meisner, Gary E (defendant)
	ATTR	JANET	Defendant: Meisner, Gary E Attorney Retained Michael E McNichols
7/7/2008	ORDR	JANET	Order of Disqualification (Bradbury)
7/14/2008	MOTN	JANET	Motion to Dismiss (filed on behalf of Def Gary Meisner)

Date: 6/8/2010  
Time: 09:42 AM  
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Second Judicial District Court - Nez Perce County

User: DIANE

ROA Report

Case: CV-2008-0001226 Current Judge: George D. Carey  
Ronald Robert McCann vs. William Vern McCann Jr, etal.

Ronald Robert McCann vs. William Vern McCann Jr, Gary E Meisner, McCann Ranch and Livestock Co.

Date	Code	User	Judge
7/16/2008	ATTR	JANET	Defendant: McCann, William Vern Jr Attorney Retained Merlyn W. Clark
		JANET	Filing: I2 - Initial Appearance by persons other than the plaintiff or petitioner more than \$300, Not more than \$1000 Paid by: Clark, Merlyn W. (attorney for McCann, William Vern Jr) Receipt number: 0317467 Dated: 7/16/2008 Amount: \$58.00 (Check) For: McCann, William Vern Jr (defendant)
	MOTN	JANET	Motion to Dismiss (filed on behalf of Def William McCann Jr)
	MEMO	JANET	Memorandum in Support of Motion to Dismiss
7/17/2008	NOAP	JANET	Notice Of Appearance
	MOTN	JANET	Motion to Dismiss (filed on behalf of McCann Ranch)
	ATTR	TERESA	Defendant: McCann Ranch and Livestock Co., Attorney Retained Chas F McDevitt
7/23/2008		JANET	Filing: I2 - Initial Appearance by persons other than the plaintiff or petitioner more than \$300, Not more than \$1000 Paid by: McDevitt, Chas F (attorney for McCann Ranch and Livestock Co.,) Receipt number: 0317877 Dated: 7/23/2008 Amount: \$58.00 (Check) For: McCann Ranch and Livestock Co., (defendant)
8/8/2008	NTSV	JANET	Notice Of Service Pl Answers to Def Inter
8/28/2008	ORDR	JANET	Order from Supreme Court assigning case to Judge Reinhardt
9/10/2008	MOTN	JANET	Plf's Motion for Disqualification of Judge with Cause
	AFFD	JANET	Affidavit of Plf in Support of Motion for Disqualification with Cause
9/15/2008	RQCO	JANET	Request For Status Conference filed by Def William McCann Jr
	MEMO	JANET	Memorandum in Opposition to Motion for Disqualification of Judge with Cause
9/17/2008	MISC	JANET	Plf's Responsive Memo to Def's Motion to Dismiss
9/19/2008	NOTD	JANET	Notice Of Service-defendant (Request for Admissions)
10/2/2008	HRSC	JANET	Hearing Scheduled (Hearing on Motions 10/21/2008 01:00 PM)
		JANET	Notice Of Hearing
10/3/2008	NOTP	JANET	Notice Of Service-plaintiff
10/14/2008	NOTP	JANET	Notice Of Service-plaintiff
	NOTP	JANET	Notice Of Service-plaintiff

Date: 6/8/2010

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Case: CV-2008-0001226 Current Judge: George D. Carey

Ronald Robert McCann vs. William Vern McCann Jr, etal.

Ronald Robert McCann vs. William Vern McCann Jr, Gary E Meisner, McCann Ranch and Livestock Co.

Date	Code	User		Judge
10/15/2008	AMCO	JANET	Amended Complaint for Equitable Relief and Damages Filed	George Reinhardt
	AFML	JANET	Affidavit Of Mailing	George Reinhardt
10/21/2008	HRHD	JANET	Hearing result for Hearing on Motions held on 10/21/2008 01:00 PM: Hearing Held	George Reinhardt
	GRNT	JANET	Motion Granted (Judge Reinhardt recused self. Mr. Esser to draft order)	George Reinhardt
	MINE	JANET	Minute Entry Hearing type: Hearing on Motions Hearing date: 10/21/2008 Time: 1:15 pm Court reporter: Keith Evans Audio tape number: C1	George Reinhardt
10/24/2008	MOTN	JANET	Motion to Dismiss Amended Complaint for Equitable Relief and Damages (filed by Def William McCann)	George Reinhardt
	MOTN	JANET	Motion to Dismiss (filed by Def Gary Meisner)	George Reinhardt
	MOTN	JANET	Motion to Dismiss Amended Complaint for Equitable Relief and Damages (filed by Def McCann Ranch)	George Reinhardt
11/3/2008	ORDR	JANET	Order of Recusal	George Reinhardt
11/12/2008	MOTN	JANET	Motion to Stay	George Reinhardt
	AFFD	JANET	Affidavit of Merlyn Clark in Support of Motion to Stay Discovery	George Reinhardt
	MEMO	JANET	Memorandum in Support of Motion to Stay Discovery	George Reinhardt
11/13/2008	MOTN	JANET	Motion to Stay Discovery	George Reinhardt
	MEMO	JANET	Gary Meisner's Memorandum in Support of Motion to Stay Discovery	George Reinhardt
11/14/2008	MOTN	JANET	Motion to Stay Discovery (Def McCann Ranch)	George Reinhardt
12/3/2008	NTHR	JANET	Notice Of Hearing	George D. Carey
	HRSC	JANET	Hearing Scheduled (Hearing on Motions 12/30/2008 01:30 AM) Mtn to Stay Discovery Mtn to Dismiss Amended Complaint any other pending motions	George D. Carey
12/12/2008	MISC	JANET	Nancy Towler (will be courtreporter)	George D. Carey
12/16/2008	CONT	JANET	Continued (Hearing on Motions 12/30/2008 01:30 PM) (Nancy Towler courtreporter) Mtn to Stay Discovery Mtn to Dismiss Amended Complaint Plf's Mtn to Compel Discovery any other pending motions	George D. Carey
	MOTN	JANET	Plf's Motion to Compel Discovery	George D. Carey
	MEMO	JANET	Memorandum of Authorities in Support of Plf's Motion to Compel Discovery	George D. Carey
	AFFD	JANET	Affidavit of Timmothy Esser in Support of Motion to Compel	George D. Carey
	AFSV	JANET	Affidavit Of Service	George D. Carey



Date: 6/8/2010

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Case: CV-2008-0001226 Current Judge: George D. Carey

Ronald Robert McCann vs. William Vern McCann Jr, etal.

Ronald Robert McCann vs. William Vern McCann Jr, Gary E Meisner, McCann Ranch and Livestock Co.

Date	Code	User		Judge
12/16/2008	NTHR	JANET	Notice Of Hearing	George D. Carey
12/17/2008	MISC	JANET	Amended Notice of Hearing	George D. Carey
12/22/2008	MEMO	JANET	Memorandum in Opposition to Plf's Motion to Compel Discovery (Def-McCann)	George D. Carey
	MEMO	JANET	Memorandum in Opposition to Plf's Motion to Compel Discovery (Def-McCann Ranch)	George D. Carey
12/23/2008	MEMO	JANET	Memorandum in Opposition to Plf's Motion to Compel Discovery (Def- Meisner)	George D. Carey
12/24/2008	MISC	JANET	Plf's Reply to Def Meisner's Memo in Opposition to Plf's Motion to Compel Discovery	George D. Carey
12/30/2008	HRHD	JANET	Hearing result for Hearing on Motions held on 12/30/2008 01:30 PM: Hearing Held (Nancy Towler courtreporter) Mtn to Stay Discovery Mtn to Dismiss Amended Complaint Plf's Mtn to Compel Discovery any other pending motions	George D. Carey
	MINE	JANET	Minute Entry Hearing type: Hearing on Motions Hearing date: 12/30/2008 Time: 1:25 pm Court reporter: Towler Audio tape number: C3	George D. Carey
	ADVS	JANET	Case Taken Under Advisement	George D. Carey
1/5/2009	MEMO	JANET	Reply Memorandum in Support of Motion to Dismiss	George D. Carey
1/8/2009	MEMO	JANET	Memorandum and Order	George D. Carey
1/15/2009	MISC	JANET	Plf's Response to def's Reply Memo (from Esser & Schwam)	George D. Carey
	AFFD	JANET	Affidavit of Timothy Esser in Support of Plf's Response	George D. Carey
3/4/2009	MEMO	DIANE	Memorandum and Order (filed in Chambers by Judge Carey)	George D. Carey
	MISC	DIANE	Partial Summary Judgment (filed in Chambers by Judge Carey)	George D. Carey
3/5/2009	MEMO	DIANE	Memorandum and Order Concerning Discovery	George D. Carey
3/9/2009	MOTN	JANET	Plf's Motion for Reconsideration (copy sent to Judge Carey)	George D. Carey
3/25/2009	NOTD	JANET	Notice Of Service-defendant	George D. Carey
3/27/2009	NOTC	JANET	Notice of Compliance	George D. Carey
3/30/2009	MOTN	JANET	Motion to set oral argument	George D. Carey
	MOTN	JANET	Motion to schedule pretrial conf	George D. Carey
	HRSC	JANET	Hearing Scheduled (Hearing on Motions 04/15/2009 03:00 PM) TELE from Ada Co on Plf's mtn for reconsideration (faxed to attorneys on 3/30/09)	George D. Carey
3/31/2009	NOTC	JANET	Notice of Service of Def McCann Ranch Answers to Plf 1st set of interrog	George D. Carey

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Date: 6/8/2010

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Case: CV-2008-0001226 Current Judge: George D. Carey

Ronald Robert McCann vs. William Vern McCann Jr, etal.

Ronald Robert McCann vs. William Vern McCann Jr, Gary E Meisner, McCann Ranch and Livestock Co.

Date	Code	User		Judge
4/2/2009	CONT	JANET	Continued (Hearing on Motions 05/14/2009 08:00 AM) TELE from Ada Co on Plf's mtn for reconsideration	George D. Carey
	MISC	JANET	Judge Carey has not set a time for 5/14/09. In order to change the date in the computer for the continuance, I had to put a time in.	George D. Carey
	NTHR	DIANE	Amended Notice Of Hearing	George D. Carey
4/20/2009	MEMO	JANET	Plf's Memorandum in Support of Motion for Reconsideration	George D. Carey
4/29/2009	NOTC	JANET	Notice of Compliance re 1st Supp Responses of Def McCann	George D. Carey
4/30/2009	MOTN	JANET	Motion to Bifurcate (D McCann Ranch)	George D. Carey
	CONT	JANET	Continued (Hearing on Motions 05/14/2009 01:00 PM) TELE from Ada Co on Plf's mtn for reconsideration D Mtn to Bifurcate	George D. Carey
	MOTN	JANET	Motion to Reconsider Decision re Motion to Dismiss Plf's Complaint Seeking Dissolution of the Corporation Pursuant to IC 30-1-1430(2)(b) (D -McCann Ranch)	George D. Carey
	MEMO	JANET	Memorandum in Support of Motion for Reconsideration (D- McCann Ranch)	George D. Carey
	NOTC	JANET	Notice of Compliance Re Supp Responses of Norminal Def McCann Ranch	George D. Carey
	NTHR	DIANE	Notice Of Hearing	George D. Carey
5/7/2009	MISC	JANET	Plf's Response to Def's Motion for Reconsideration & Def's Motion to Bifurcate & Supp Authority in Support of Plf's Motion for Reconsideration	George D. Carey
	MEMO	JANET	Memorandum in Opposition to Plf's Motion for Reconsideration (D- McCann Ranch)	George D. Carey
5/8/2009	ANSW	PAM	Nominal Defendant McCann Ranch & Livestock Company Inc.'s Answer to Plaintiff's Amended Complaint for Equitable Relief and Damages	George D. Carey
	ANSW	JANET	Def Gary Meisner's Answer to Plf's Amended Complaint for Equitable Relief and Damages	George D. Carey
	NTSV	JANET	Notice Of Service	George D. Carey
	NTSV	JANET	Notice Of Service	George D. Carey
5/11/2009	ANSW	JANET	Def's McCann's Answer to Plf's Amended Complaint for Equitable Relief and Damages	George D. Carey
5/12/2009	AFFD	JANET	Affidavit of William McCann in Support of Motion for Reconsideration	George D. Carey
	MEMO	JANET	Reply Memorandum in Support of Def's Motion for Reconsideration (D-McCann Ranch)	George D. Carey

Date: 6/8/2010

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Case: CV-2008-0001226 Current Judge: George D. Carey

Ronald Robert McCann vs. William Vern McCann Jr, etal.

Ronald Robert McCann vs. William Vern McCann Jr, Gary E Meisner, McCann Ranch and Livestock Co.

Date	Code	User		Judge
8/18/2009	OBJC	JANET	Objection and Motion to Strike Inadmissible Statements in Affd of Timothy Esser	George D. Carey
	OBJC	JANET	Objection and Motion to Strike Inadmissible Statements in Affd of Timothy Esser (corrected filing)	George D. Carey
8/19/2009	MEMO	PAM	Plaintiff's Responsive Discovery Memorandum	George D. Carey
	AFFD	PAM	Supplemental Affidavit of Timothy Esser	George D. Carey
	MOTN	PAM	Motion for Protective Order--Defendant Gary Meisner	George D. Carey
	MISC	PAM	Reply of Defendant William V. McCann Jr. To Plaintiff's Responsive Discovery Memorandum	George D. Carey
8/24/2009	ADVS	JANET	Hearing result for Hearing on Motions held on 08/24/2009 03:00 PM: Case Taken Under Advisement Def Mtn for Protective Order Plf Mtn to Compel	George D. Carey
8/25/2009	NTSV	JANET	Notice Of Service	George D. Carey
8/31/2009	MEMO	JANET	2nd Memorandum and Order Concerning Discovery	George D. Carey
9/8/2009	NTSV	JANET	Notice Of Service of Response to Demand of Ronald R McCann (Nominal Def)	George D. Carey
9/9/2009	NOTC	JANET	Notice of Delivery of Original Depo Transcript of Gertrude McCann to Timothy Esser	George D. Carey
9/18/2009	MOTN	JANET	Plf's Motion to Amend Amended Complaint	George D. Carey
	AFFD	JANET	Affidavit of Timothy Esser in Support of Plf's Mtn to Amend Amended Complaint	George D. Carey
9/28/2009	NOTC	JANET	Notice of Compliance	George D. Carey
9/30/2009	HRSC	JANET	Hearing Scheduled (Hearing on Motions 10/23/2009 01:30 PM) Motion to Amend Complaint hearing in Boise Ada Co Courthouse	George D. Carey
10/16/2009	MEMO	JANET	Memorandum in Opposition to Motion to Amend Amended Complaint	George D. Carey
	MISC	JANET	Joinder in the McCann Rancy Memo in Opposition to Plf's Motion to Amend the Amended Complaint	George D. Carey
10/19/2009	MISC	JANET	Def Gary Meisner's Joinder in McCann Ranch's Memo in Opposition to Plf's mtn to Amend Amended Complaint	George D. Carey
10/20/2009	MEMO	JANET	Plf's Reply Memorandum Re Motion to Amend Amended Complaint	George D. Carey
10/21/2009	MOTN	JANET	Joint Motion for Entry of Order Pursuant to IRCP Rule 16(B) and Stip of the Parties	George D. Carey
	STIP	JANET	Stipulation for Revised Pretrial Syched	George D. Carey
	HRSC	JANET	Hearing Scheduled (Court Trial 05/17/2010 09:00 AM)	George D. Carey

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Case: CV-2008-0001226 Current Judge: George D. Carey

Ronald Robert McCann vs. William Vern McCann Jr, etal.

Ronald Robert McCann vs. William Vern McCann Jr, Gary E Meisner, McCann Ranch and Livestock Co.

Date	Code	User		Judge
10/21/2009	HRSC	JANET	Hearing Scheduled (Pretrial Conference 05/03/2010 09:00 AM)	George D. Carey
10/23/2009	HRHD	JANET	Hearing result for Hearing on Motions held on 10/23/2009 01:30 PM: Hearing Held Motion to Amend Complaint hearing in Boise Ada Co Courthouse	George D. Carey
10/27/2009	MOTN	JANET	Plfs' Motion for Review of Privilege Log	George D. Carey
	MISC	JANET	Response to Plf's Motion for Review of Privilege Log (Def Nominal)	George D. Carey
10/28/2009	MISC	JANET	Supp Authority in Response to Plf's Motion for Review of Privilege Log (D Nominal)	George D. Carey
11/5/2009	ORDR	JANET	Order Pursuant to IRCP Rule 16(b) and Stipulation of the Parties	George D. Carey
	CONT	JANET	Continued (Pretrial Conference 05/07/2010 01:30 PM)	George D. Carey
11/12/2009	MEMO	JANET	Memorandum to Counsel	George D. Carey
	MEMO	JANET	Memorandum and Order on Motion to Amend Previously Amended Complaint	George D. Carey
11/17/2009	AFFD	JANET	Affidavit of Timothy Esser in Support of Plf's Motion for Review of Privilege Log	George D. Carey
11/20/2009	MEMO	JANET	Memorandum of Def William McCann Jr re Plf's Motion for review of Privilege Log	George D. Carey
	AFFD	JANET	Affidavit of Merlyn Clark re Plf's Motion for Review of Privilege Log	George D. Carey
11/23/2009	AFFD	JANET	Responsive Affidavit of Timothy Esser Re: Privilege Log	George D. Carey
	NTSV	JANET	Notice Of Service Plf's 2nd Inter to Def Gary Meisner	George D. Carey
	NTSV	JANET	Notice Of Service Plf 5th Discovery Request to Def McCann Ranch	George D. Carey
	MEMO	JANET	3rd Memorandum and Order Concerning Discovery	George D. Carey
11/24/2009	STIP	JANET	Stipulation to vacate trial setting and reschedule trial in July 2009 (s/b 2010)	George D. Carey
11/25/2009	CONT	JANET	Continued (Court Trial 07/19/2010 09:00 AM)	George D. Carey
	HRVC	JANET	Hearing result for Pretrial Conference held on 05/07/2010 01:30 PM: Hearing Vacated	George D. Carey
12/14/2009	NTSV	JANET	Notice Of Service (Def Meisner)	George D. Carey
12/16/2009	NTSV	JANET	Notice Of Service (P McCann)	George D. Carey
12/23/2009	NOTC	JANET	Notice of Compliance	George D. Carey
1/15/2010	MOTN	JANET	McCann Ranch Motion for Summary Judgment	George D. Carey
	AFFD	JANET	Affidavit of Gary Meisner	George D. Carey
	MEMO	JANET	Memorandum in Support of McCann Ranch Motion for Summary Judgment	George D. Carey

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Date: 6/8/2010

Second Judicial District Court - Nez Perce County

User: DIANE

Time: 09:42 AM

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Case: CV-2008-0001226 Current Judge: George D. Carey

Ronald Robert McCann vs. William Vern McCann Jr, etal.

Ronald Robert McCann vs. William Vern McCann Jr, Gary E Meisner, McCann Ranch and Livestock Co.

Date	Code	User		Judge
1/15/2010	AFFD	JANET	Affidavit of James Schoff in Support of Def McCann Ranch Motion for Summary Judgment	George D. Carey
	AFFD	JANET	Affidavit of William McCann in Support of Def McCann Ranch Motion for Summary Judgment	George D. Carey
	AFFD	JANET	Affidavit of Dorothy Snowball in Support of Def McCann Ranch Motion for Summary Judgment	George D. Carey
1/19/2010	MOTN	JANET	Def William McCann' Motion for Summary Judgment	George D. Carey
	HRSC	JANET	Hearing Scheduled (Motion for Summary Judgment 02/25/2010 11:00 AM) Def McCann Ranch motion at ADA Courthouse, Boise	George D. Carey
1/20/2010	MOTN	JANET	Def Gary Meisner's Joinder in McCan Ranch Motion for Summary Judgment	George D. Carey
2/3/2010	MISC	JANET	Def William McCann's Expert Witness List	George D. Carey
2/4/2010	MISC	JANET	Def Gary Meisner's Joinder in Def's Expert Witness List	George D. Carey
	MISC	JANET	De's Expert Witness List (Norminal Def)	George D. Carey
2/12/2010	MISC	JANET	Plf's Responsive Summary Judgment Memo	George D. Carey
	AFFD	JANET	Affidavit of Dennis R Reinstein CPA	George D. Carey
	AFFD	JANET	Affidavit of Karen Ginnett CPA	George D. Carey
	AFFD	JANET	Affidavit of Ronald McCann	George D. Carey
2/16/2010	ORDR	JANET	Order Amending Order Pursuant to IRCP Rule 16(b) Re Expert Witness Depositions	George D. Carey
	STIP	DIANE	Stipulation to Amend Order Pursuant to IRCP Rule 16(b) Re Expert Witness Depositions	George D. Carey
2/17/2010	MOTN	JANET	Motion (McCann Ranch) to Strike and Disregard Testimony from the Affidavits of Karen Ginnett, Dennis Reinstein and the Related Argument Contained in Plf's Responsive Summary Judgment Memo (Oral Argument is Requested)	George D. Carey
	MOTN	JANET	Motion to Shorten Time on Motion (McCann Ranch) to Strike and Disregard Testimony from the Affidavits of Karen Ginnett, Dennis Reinstein and the Related Argument Contained in Plf's Responsive Summary Judgment Memo	George D. Carey
	MEMO	JANET	Memorandum in Support of Motion (McCann Ranch) to Strike and Disregard Testimony from the Affidavits of Karen Ginnett, Dennis Reinstein and the Related Argument Contained in Plf's Responsive Summary Judgment Memo	George D. Carey
2/18/2010	MISC	JANET	Def Gary Meisner's Joinder in McCann Ranch's Motion to Strike and Disregard Testimony from the Affidavits of Karen Ginnett, Dennis Reinstein and the Related Argument Contained in Plf's Responsive Summary Judgment Memo	George D. Carey

Date: 6/8/2010

Second Judicial District Court - Nez Perce County

User: DIANE

Time: 09:42 AM

ROA Report

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Case: CV-2008-0001226 Current Judge: George D. Carey

Ronald Robert McCann vs. William Vern McCann Jr, etal.

Ronald Robert McCann vs. William Vern McCann Jr, Gary E Meisner, McCann Ranch and Livestock Co.

Date	Code	User	Judge
2/18/2010	MEMO	JANET	Reply Memorandum of McCann Ranch's Motion for Summary Judgment
	AFFD	JANET	Affidavit of Counsel in Support of McCann Ranch's Motion for Summary Judgment
	MISC	JANET	Joinder in the McCann Ranch's Motion to Strike and Disregard Testimony from the Affidavits of Karen Ginnett, Dennis Reinstein and the Related Argument Contained in Plf's Responsive Summary Judgment Memo
	MISC	JANET	Joinder in McCann Ranch's Reply Memo in Support of McCann Ranch's Motion for Summary Judgment
2/19/2010	MISC	JANET	Def's Gary Meisner's Joinder in McCann Ranch's Reply Memo in Support of Motion for Summary Judgment
2/23/2010	MISC	DIANE	Plf's Response to Def McCann Ranch & Livestock's Motion to Strike
	MISC	PAM	Plaintiff's Response to Defendant McCann Ranch & Livestock's Motion to Strike
2/24/2010	MISC	PAM	Plaintiff's Correction/Supplemental Authority
	MOTN	PAM	Motion to Shorten Time on Plaintiff's Correction/Supplemental Authority
	MEMO	PAM	Reply Memorandum in Support of McCann Ranch & Livestock Company, Inc.'s Motion to Strike and Disregard Testimony from the Affidavits of Karen A. Ginnett, CPA, CFE, MST, and from the Affidavits of Dennis R. Reinstein, CPA/ABV, ASA, CVA, and the Related Argument Contained in Plaintiff's Responsive Summary Judgment Memorandum
	MISC	PAM	Objection to Plaintiff's Motion to Shorten Time on Plaintiff's Correction/Supplemental Authority
2/25/2010	HRHD	JANET	Hearing result for Motion for Summary Judgment held on 02/25/2010 11:00 AM: Hearing Held Def McCann Ranch motion at ADA Courthouse, Boise
3/5/2010	MEMO	JANET	Memorandum and Order Concerning Various Motions
	MISC	JANET	Judgment (Amended Complaint of Plf's Ronald McCann is dismissed with prejudice)
	GRNT	JANET	Motion Granted (Plaintiff's Motion to file additional documents)
	GRNT	JANET	Motion Granted (Def's Motion to Strike is granted to extent noted in Memo)
	GRNT	JANET	Motion Granted (Def's Motion for Summary Judgment)
3/9/2010	MISC	JANET	Supplemental Authority

Date: 6/8/2010

Second Judicial District Court - Nez Perce County

User: DIANE

Time: 09:42 AM

ROA Report

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Case: CV-2008-0001226 Current Judge: George D. Carey

Ronald Robert McCann vs. William Vern McCann Jr, etal.

Ronald Robert McCann vs. William Vern McCann Jr, Gary E Meisner, McCann Ranch and Livestock Co.

Date	Code	User	Judge
3/18/2010	MEMC	JANET	Def's Joint Memorandum Of Costs and Attorney Feed George D. Carey
	MEMO	JANET	Def's Joint Memorandum in Support of Request for Costs and Attorney Fees George D. Carey
	AFFD	JANET	Affidavit of Chas F McDevitt George D. Carey
		DIANE	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Esser & Sandberg Receipt number: 0005972 Dated: 3/19/2010 Amount: \$101.00 (Check) For: McCann, Ronald Robert (plaintiff) George D. Carey
	NTAP	DIANE	Notice Of Appeal George D. Carey
	HRVC	JANET	Hearing result for Court Trial held on 07/19/2010 09:00 AM: Hearing Vacated George D. Carey
	APDC	DIANE	Appeal Filed In District Court George D. Carey
	APSC	DIANE	Appealed To The Supreme Court George D. Carey
3/19/2010	AFFD	JANET	Affidavit of Merlyn Clark in Support of Motion for Costs and Attorney Fees George D. Carey
	AFFD	JANET	Affidavit of Michael McNichols George D. Carey
3/24/2010	BNDC	DEANNA	Bond Posted - Cash (Receipt 6231 Dated 3/24/2010 for 100.00) George D. Carey
	BONC	DEANNA	Condition of Bond Estimate for clerk's record George D. Carey
3/30/2010	AFFD	JANET	Affidavit of Timothy Esser George D. Carey
	MISC	JANET	Plf's Objection to Def's Claimed Costs George D. Carey
4/1/2010	MISC	JANET	Exhibit to Plf's Objection to Def's Claimed Costs George D. Carey
	MISC	DEANNA	Request for Additional Transcript and Record George D. Carey
4/2/2010	SCRT	DIANE	Supreme Court Receipt - Notice of Appeal received at SC. Record to be filed 6/2/2010 George D. Carey
4/7/2010	SCRT	DIANE	Supreme Court Receipt - Clerk's Certificate filed at SC George D. Carey
4/12/2010	MISC	DIANE	Amended Request for Additional Transcript and Record George D. Carey
	NTHR	DIANE	Notice Of Hearing George D. Carey
	BNDC	DIANE	Bond Posted - Cash (Receipt 7552 Dated 4/13/2010 for 100.00) George D. Carey
	HRSC	JANET	Hearing Scheduled (Telephonic Motion Hearing 05/13/2010 01:30 PM) Def's Memo of Costs and Att Fees & Plf's Objections George D. Carey
4/14/2010	MISC	JANET	Def's Joint Reply in Support of Request for Costs and Att Fees. George D. Carey
4/19/2010	SCRT	DIANE	Supreme Court Receipt - Amended Request for Additional Transcript and Record filed at SC George D. Carey
4/30/2010	MISC	JANET	Plf's Surrebuttal to Def's Request for Attorney Fees George D. Carey
5/18/2010	MEMO	JANET	Memorandum and Order Concerning Costs George D. Carey

REGISTER OF ACTIONS

11

Date: 6/8/2010

Second Judicial District Court - Nez Perce County

User: DIANE

Time: 09:42 AM

ROA Report

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Case: CV-2008-0001226 Current Judge: George D. Carey  
Ronald Robert McCann vs. William Vern McCann Jr, etal.

Ronald Robert McCann vs. William Vern McCann Jr, Gary E Meisner, McCann Ranch and Livestock Co.

Date	Code	User		Judge
5/18/2010	MISC	JANET	Supplemental Judgment	George D. Carey
	CDIS	JANET	Civil Disposition entered for: McCann Ranch and Livestock Co., Defendant; McCann, William Vern Jr, Defendant; Meisner, Gary E, Defendant; McCann, Ronald Robert, Plaintiff. Filing date: 5/18/2010	George D. Carey
5/24/2010	SCRT	DIANE	Supreme Court Receipt - Record and Transcripts to be filed at SC on 7/23/2010	George D. Carey
	MOTN	JANET	Plf's Motion's to Clarify	George D. Carey
5/25/2010	MEMO	JANET	Def's Joint Memorandum in Support of Motion for Reconsideration	George D. Carey
5/26/2010	MEMO	JANET	Memorandum to Counsel	George D. Carey
6/1/2010	MISC	JANET	Response to Plf's Motion to Clarify	George D. Carey
	MISC	DIANE	Joinder in the McCann Ranch & Livestock Company, Inc's Response to Plf's Motion to Clarify	George D. Carey
6/2/2010	MISC	JANET	Plf's Response to Def's Motion for Reconsideration	George D. Carey
	MISC	JANET	Def Gary Meisner's Joinder in McCann Ranch's Response to Plf's Motion to Clarify	George D. Carey
6/7/2010	MISC	JANET	Def's Reply Memo in Support of Motion for Reconsideration and Waiver of Oral Argument	George D. Carey
	MISC	JANET	AMENDED Def's Reply Memo in Support of Motion for Reconsideration and Waiver of Oral Argument	George D. Carey



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Attorneys for Plaintiff

FILED

2008 JUN 10 PM 4 30

PATTY O. WEEKS  
CLERK OF THE DIST. COURT  
*[Signature]*  
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN, )

Plaintiff, )

v. )

WILLIAM V. McCANN, JR., and )

GARY E. MEISNER, )

Defendants, )

McCANN RANCH & )

LIVESTOCK )

COMPANY, INC., )

Nominal Defendant.

No. **CV08-01226**

COMPLAINT FOR EQUITABLE  
RELIEF AND DAMAGES

Fee Category: A(1)

Fee: \$88.00

1. Plaintiff Ronald R. McCann is a resident of Lewiston, Idaho. He is 61 years old.

He is a shareholder of Defendant McCann Ranch & Livestock Company, Inc. He owns 91,700 shares of the 250,000 outstanding shares of said corporation, i.e., he owns 36.7% of the common stock.

2. Defendant William V. McCann, Jr., is the president and chief operating officer of the corporation and one of its directors. He also owns 91,700 shares of the

common stock, the same amount as his brother, the Plaintiff. Defendant William McCann, Jr. is 65 years old.

3. Defendant Gary Meisner holds as trustee, for the benefit of Gertrude McCann, the balance of the common stock – 66,600 shares. Defendant Meisner, besides being a shareholder in his trustee capacity, is also a director of the corporation. Gertrude McCann, the mother of Plaintiff and Defendant McCann is almost 92 years old.
4. Defendant McCann Ranch & Livestock, Inc., is an Idaho corporation with its principal place of business located in Lewiston, Idaho. This Complaint is not directed against misconduct of the corporation itself. The corporation is included as a nominal party as required by I.C. §30-1-1430, et seq.

#### HISTORY OF CORPORATION

5. The Defendant corporation was formed in 1974 by William V. McCann, Sr. McCann Senior transferred to his newly formed corporation his extensive ranch and timber holdings and his undeveloped real estate located in or near Lewiston, Idaho. Over the next several years he gifted to each of his sons 36.7% of the stock. McCann Senior, even though he owned the fewest shares, was the controlling director and officer of the corporation until his death on October 27, 1997.
6. McCann Senior formed his corporation primarily for estate planning purposes; to limit estate and inheritance tax exposure and to facilitate the transfer of his estate to his children. McCann Senior had no intention of excluding Plaintiff from enjoying the expected benefits from his gifted stock.

7. Throughout Plaintiff's adult life, both before and after formation of the Defendant corporation, he provided huge amounts of uncompensated labor for the benefit of his father's business interests, and, after the formation of the corporation, for the benefit of the corporation. During winters he dozed and graded roads, hauled cattle, branded cattle; during summers he made hay, hauled hay and hauled cattle and farmed. When his father was injured or sick, Plaintiff would take time off from his own occupation (he worked primarily as a teamster) to assist with the farming and ranching operations. He took an entire month off to do the ranch work the year his father suffered a broken back.
8. Defendant William McCann, Jr., provided much less physical labor.
9. For the first two decades of the corporation's existence neither son received any type of remuneration .
10. In the year or two before William Senior's death, in 1997, Defendant William McCann, Jr., who had been engaged in the fulltime private practice of law, became more involved in the management of the corporation.
11. The assets of the corporation include approximately thirteen commercial sites which have been improved with the completion of buildings which are then leased to various corporations, for examples, Shari's restaurant, Staples, Hollywood Video. These commercial sites are located in Lewiston.
12. In addition to the commercial sites, the corporation owns and manages timberland, ranchland and a substantial cattle heard. And the corporation owns undeveloped property located in Lewiston which could be converted to commercial sites.

13. The fair market value of the corporate assets is over twenty-five million dollars.

The corporation has a long term loan against its commercial sites which had a principal balance as of year end 2006 of five million two hundred twenty-two thousand dollars (\$5,222,000). For the fiscal year 2006 (ending December 31, 2006), the corporation had positive cash flow after payment of expenses, taxes and debt reduction, but before payment of any kind to any shareholder, in excess of \$320,000.

#### SENIOR'S WILL

14. Following Mr. McCann's death, his will was admitted to probate in Nez Perce County District Court. His will bequeathed the 66,000 shares that he had not gifted to his sons, in trust to Defendant Gary Meisner, for the benefit of Mr. McCann's spouse, Gertrude McCann.

15. The terms of William McCann, Sr.'s Will provided that the trustee, Defendant Meisner, was to vote the stock in the corporation in a manner to provide an income to the beneficiary of the trust, Gertrude McCann, and further, if in order to provide her with sufficient income, the stock could be redeemed.

16. Thus, if the corporation redeemed any of Gertrude's stock, such act would increase the ownership interests of Plaintiff Ronald McCann and Defendant William McCann, Jr., equally. And further, if the corporation declared dividends in order to provide income to Gertrude, all shareholders would receive dividends proportionate to their ownership, i.e., Plaintiff Ronald McCann and Defendant William McCann, Jr., would also receive dividends.

17. McCann Senior's Will provided that upon the death of Gertrude McCann any stock remaining in trust, which had not be redeemed, would become the property of Defendant William McCann, Jr. Although this favored Defendant William McCann, Jr., McCann Senior wrote his will knowing he had already provided well for his youngest son, Plaintiff, through previous stock transfers.

#### SQUEEZE-OUT

18. Following McCann Senior's death, Defendant McCann took over full control/management of the corporation and caused his salary to increase from \$48,000 a year to \$144,000 a year, yet he continues to maintain his law practice.

19. Since McCann Senior's death, the corporation has been controlled by Defendants Meisner and Bill McCann. These Defendants have not redeemed any of Gertrude's stock because such redemption would provide a benefit to Plaintiff, proportionate to the benefit thereby provided to Defendant Bill McCann, i.e., increase equally their ownership.

20. Defendants McCann and Meisner caused the number of directors to be changed, removing Plaintiff from the Board of Directors.

21. Defendants McCann and Meisner have refused to authorize the corporation to employ Plaintiff.

22. Since Defendants McCann and Meisner assumed control of the corporation, they have refused to declare a reasonable amount of dividends despite sufficient profit and cash flow. Dividends have only been declared three times in the last twelve years. The Plaintiff received the following dividends \$3,668 for year 2004, \$9,170 for year 2006, and \$12,838 for 2008. The net fair market value of the corporate

assets is at least 20 million dollars. An annual four percent rate of return (a rate readily obtained from a no risk investment) on \$20,000,000 would equal \$800,000 per year. Instead of receiving over \$290,000 in one year, Plaintiff has received \$25,676 in twelve years.

23. The paltry dividends which have been declared, were declared in response to the fact that Plaintiff resorted to legal counsel in an effort to obtain honorable treatment or to extricate his interest from the corporation. A shareholder of a closely held corporation should not need to retain counsel in order to receive a reasonable rate of return on his interest. The fact that the corporation has declared paltry dividends in response to his efforts is further evidence of Defendants' determination to squeeze-out Plaintiff and is evidence that the squeeze-out will continue unless Plaintiff's prayer for relief is granted.

24. For year 2007, the corporation failed to hold an annual shareholder meeting as called for by the corporate bylaws.

25. Rather than declaring dividends, which would benefit Plaintiff, Defendants McCann and Meisner have annually voted for the corporation to engage in phony financial transactions to benefit Gertrude. For example, they have caused the corporation to enter into purchases and/or leases with her concerning her home place and shop. They vote to have the corporation pay substantial bonuses/consulting fees to the elderly woman. Recently, Defendant McCann has been transferring money to Gertrude from his own pocket, because he has figured out that would be cheaper for him in the long run than for the corporation to

declare reasonable dividends or redeem her stock, which actions would necessarily benefit Plaintiff.

26. These actions of Defendants Bill McCann and Meisner constitute a squeeze-out of Plaintiff. They are an effort to force Plaintiff to sell his stock to the corporation for a fraction of its true value.

27. The bylaws of the corporation contains Article VI, Section 4 which reads:

Section 4. Restriction on Repurchase. No stockholder shall have the right or power to pledge, sell or otherwise dispose of, except by will, any share or shares of capital stock of this corporation without first offering the said share or shares of stock for sale to the corporation at the book value of such stock at the time of offering as determined by the corporation's certified public accountant. Such offer shall be made in writing signed by such stockholder and sent by mail to the corporation at its principal place of business, and such offer shall remain good for acceptance by the corporation for a period of thirty (30) days from the date of mailing of such notice. These provisions shall be binding also upon any executor, administrator or other legal representative of every stockholder in case of a sale or pledge of any share or shares of stock by such executor, administrator or other legal representative of any stockholder, and every certificate of stock to be issued by the corporation shall have printed on and embodied in such certificate the following words:

"The transfer of the shares represented by this certificate is restricted by the By-Laws of the corporation and a copy of the complete provisions of such restriction may be obtained from the corporation upon request."

The corporation, if it desires to accept such offer from any stockholder, shall within thirty (30) days from the date of mailing of such notice by the stockholder, accept such offer by depositing in the United States mail, postage prepaid, an acceptance of the offer addressed to the offering stockholder(s) at his last known address. The stockholder shall, within fifteen (15) days after such letter of acceptance is placed in the United States mail, as above set forth, surrender his certificates representing the stock offered to the corporation and shall receive from the corporation in cash, a check drawn on the corporation account, or cashier's check, ten percent (10%) of the purchase price and an installment note for the balance of the purchase price payable in sixty (60) equal monthly installments, the first of which shall commence

thirty (30) days after surrender of the certificate(s) as set forth above, with like payments in each consecutive month thereafter, such note to bear interest at the rate of six percent (6%).

The book value claimed by the corporation for all of its assets as of December 31, 2006 was, \$1,426,707. This limitation effectively prevents Plaintiff from disposing of his shares for their true value. This Section, of course, only limits Plaintiff. The controlling two shareholders do not have to comply with this because they can amend it away whenever it suits them.

28. On June 19, 2000, Plaintiff filed an action in Nez Perce County District Court, Cause Number CV-00-01111, naming William McCann, Gary Meisner and the corporation as defendants. By an Opinion and Order entered by Judge Reinhart on January 5, 2001, the action was dismissed because Judge Reinhart found that the plaintiff had failed to comply with the statutory requirements for a derivative action. The matter was appealed. The Idaho Supreme Court upheld the dismissal in an opinion filed December 31, 2002, reported at 138 Idaho 228. The Supreme Court at page 234 of decision held, "this court upholds the district court's determination that the causes of action alleged by Ron were derivative rather than individual in nature."

29. Herein, the Plaintiff explicitly and solely brings individual causes of action.

#### FIRST CAUSE OF ACTION:

30. The Idaho Supreme Court held in the case of Steelman v. Malory, 110 Id. 510, 716 P.2d 1282 (1986) that a direct cause of action exists on behalf of a minority shareholder in a closely held corporation against the controlling



shareholders/directors if they breach the fiduciary duties they owe to the minority shareholder.

31. A controlling director/shareholder in a closely held corporation owes a fiduciary duty to the minority shareholders akin to what a partner owes his fellow partner in a partnership, including utmost good faith, fairness, and loyalty and in particularly management decisions that provide a current and fair rate of return/benefit to the minority shareholder.

32. Defendants have breached their fiduciary duty by management decisions and artifices which deprive Plaintiff of any real benefit from his more than five million dollar asset and effectively transfer to Bill McCann the benefit of Plaintiff's asset.

33. The Court has the equitable power to right this wrong by entering orders as requested in the prayer for relief.

SECOND CAUSE OF ACTION: PLED AS AN ALTERNATIVE CAUSE OF ACTION IF NECESSARY:

34. Idaho Code Section 30-1-1430 provides that a shareholder of an Idaho corporation may bring suit to have the corporation dissolved if the directors or those in control of the corporation have acted in an oppressive manner, and irreparable injury to the corporation is threatened.

35. The Idaho statutes do not define the term oppression. Case law has established that it is not necessary that fraud, illegality, or even loss be shown to establish that a minority shareholder and his interest in the corporation are subject to oppression. Case law, and the leading legal authorities provide that oppression, within the meaning of Idaho Code 30-1-1430, is best defined in the terms of the

reasonable expectations of the minority shareholders and in particular the circumstances at hand.

36. A minority shareholder in a closely held corporation such as the corporation in this case would have, and Ronald McCann has, reasonable expectations that the corporation be managed in a manner which would provide him current and significant benefits based upon his ownership interests.

37. Plaintiff has suffered oppression under the management decisions of the controlling Defendants since the death of his father.

38. The corporation does not provide benefits to its shareholders consistent with their reasonable expectations. This does threaten irreparable harm to the corporation.

39. Nevertheless, a review of the history of the Idaho dissolution statutes indicates that the clause "irreparable damage" is limited in application to publicly traded corporations and should not apply to block an equitable remedy for a shareholder in a closely held corporation who can establish oppression.

40. Idaho District Courts have equitable power to provide a remedy to a shareholder of a closely held corporation who establishes oppression, including the remedy of a forced buyout of his shares for their fair market value, without discount for his minority position.

WHEREFORE, Plaintiff requests the following relief:

1. A Court order which establishes a process to provide an equitable reorganization of the corporation such that a tax free spin-off is accomplished. A subsidiary corporation should be organized and initially owned by the Defendant corporation. 36.68% of the fair market value of the corporate assets should be

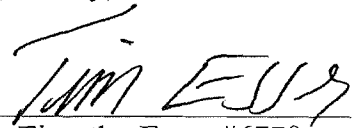
transferred to the subsidiary corporation. The stock of the subsidiary corporation should then be transferred to Plaintiff in redemption of his stock in the Defendant corporation.

2. Damages should be awarded against Defendants McCann and Meisner in an amount that will reasonably compensate Plaintiff for sums Plaintiff should have, but did not receive.
3. The Court should order that Defendants McCann and Meisner pay for Plaintiff's court costs, attorney fees and any expert witness fees and consulting fees necessary to provide appropriate equitable relief.
4. The Court should provide such other and further equitable relief and/or damages as the Court determines to be appropriate.

DATED: This 10<sup>th</sup> day of June 2008.

Libey, Ensley, Esser & Nelson

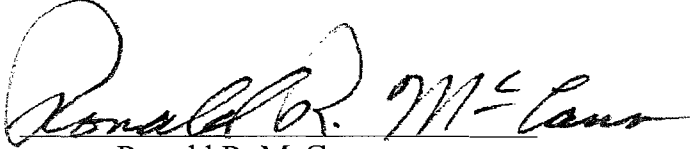
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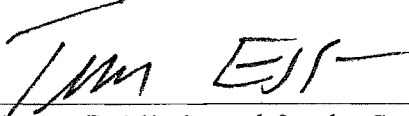
Timothy Esser #6770  
Attorneys for Plaintiff

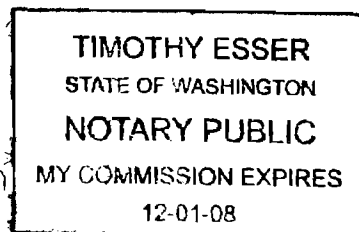
STATE OF WASHINGTON       )  
  ) ss  
County of Whitman        )

Ronald R. McCann, being first duly sworn on oath, deposes and says: That he is the Plaintiff above-named; that he has read the above and foregoing Complaint for Equitable Relief and Damages, knows the contents thereof and that the same is true as he does verily believe.

  
\_\_\_\_\_  
Ronald R. McCann

Signed and sworn to before me on the 10<sup>th</sup> day of June,  
2008.

  
\_\_\_\_\_  
Notary Public in and for the State of  
Washington, residing at Pullman  
My appointment expires 12/1/08



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2008 JUL 14 PM 2 35  
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CLERK OF THE DIST. COURT  
DEPUTY  
*Tamara J. Rees*

Attorneys for Defendant Gary Meisner

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,	)	
	)	Case No: CV 08-1226
Plaintiff,	)	
	)	MOTION TO DISMISS
vs.	)	
	)	
WILLIAM V. McCANN, JR., and	)	
GARY E. MEISNER,	)	
	)	
Defendants,	)	
	)	
McCANN RANCH & LIVESTOCK	)	
COMPANY, INC.,	)	
	)	
Nominal Defendant.	)	

Defendant Gary E. Meisner moves the Court, pursuant to Rule 12(b)(6) I.R.C.P., Rule 23(f) I.R.C.P., Idaho Code § 30-1-741 and Idaho Code § 30-1-742 to dismiss the complaint of the plaintiff on the grounds that the complaint fails to state a claim against this defendant upon which relief can be granted and on the grounds that the

complaint fails to comply with the requirements of Rule 23(f) I.R.C.P., and on the grounds that the complaint violates § 30-1-741 and § 30-1-742, Idaho Code.

This defendant joins in and adopts the MEMORANDUM IN SUPPORT OF MOTION TO DISMISS of co-defendant William V. McCann, Jr.

Oral argument is requested.

DATED this 14<sup>th</sup> day of July, 2008.

CLEMENTS, BROWN & McNICHOLS, P.A.

By:   
MICHAEL E. McNICHOLS

CERTIFICATE OF SERVICE

I hereby certify that on the 14<sup>th</sup> day of July, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Libey, Ensley, Esser & Nelson, PLLC  
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    X     U.S. MAIL  
           HAND DELIVERED  
           OVERNIGHT MAIL  
    X     TELECOPY (FAX)

  
Michael E. McNichols

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Attorneys for Defendant William V. McCann, Jr.

FILED  
2008 JUL 16 AM 11 24  
CLERK OF THE DIST. COURT  
DEPUTY  
*Amelia Schnew*

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN,

Plaintiff,

vs.

WILLIAM V. McCANN, JR., and  
GARY E. MEISNER,

Defendants,

McCANN RANCH & LIVESTOCK  
COMPANY, INC.

Nominal Defendant.

Case No. CV 08-01226

MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS

## I. INTRODUCTION

On June 10, 2008, Plaintiff filed a Complaint in this matter entitled Complaint For Equitable Relief and Damages (hereinafter the “Complaint”). The Complaint asserts two alternative causes of action. First, Plaintiff alleges that Defendants have breached fiduciary duties owed to Plaintiff. Complaint ¶¶ 30-33. Second, Plaintiff alleges that Defendants’ conduct constitutes “oppression” under I.C. § 30-1-1430, which relates to judicial dissolution of an Idaho corporation. Complaint ¶¶ 34-40. Both causes of action must be dismissed on res judicata grounds because they are based on the same transaction or series of transactions as a lawsuit Plaintiff brought and was dismissed with prejudice many years ago against these same Defendants. In addition to being barred by res judicata, Plaintiff’s Complaint must be dismissed for failure to state a claim and failure to comply with the written demand requirements for a derivative action set forth in Idaho Code § 30-1-742.

## II. FACTUAL BACKGROUND

The present dispute between Plaintiff Ronald R. McCann and the Defendants began over 8 years ago and has already run its course through the Idaho courts. Plaintiff is a shareholder in McCann Ranch & Livestock Company, Inc. (the “Corporation”). On June 19, 2000, Plaintiff filed an action in Nez Perce County District Court, Case No. CV-00-01111 (*McCann I*), naming as defendants two shareholders of the Corporation, William McCann, Jr. and Gary Meisner (the “Director Defendants”). *See* Complaint, ¶ 28. Plaintiff’s 2000 lawsuit alleged a variety of causes of action against the Director Defendants, including breach of fiduciary duties, negligence, conversion, self-dealing and conflict of interest transactions. *See* Complaint filed in *McCann I* (the “*McCann I* Complaint”), ¶¶ 4.1 - 8.7.



The Director Defendants moved to dismiss the *McCann I* Complaint for failure to follow the written demand requirement for bringing a derivative action against the directors of a corporation. See I.C. § 30-1-742 (“No shareholder may commence a derivative action until . . . ninety (90) days have expired from the date the [written] demand was made [upon the corporation to take suitable action]”). See Opinion and Order Re: Pending Motions (the “*McCann I* District Court Opinion”), pp. 6-8. The District Court concluded that the causes of action were derivative claims subject to the written demand requirement set forth in I.C. § 30-1-742. See *id.* at p. 4. The District Court stayed the action for ninety (90) days to allow Plaintiff to comply with the written demand requirement and ordered that “issues raised in the complaint which are not resolved by the Board of Directors under I.C. § 30-1-742(2), can be raised after the expiration of the 90-day period.” *Id.* (emphasis added).

Plaintiff failed to comply with this order from the District Court. Plaintiff made a written demand on the Corporation, but then filed an Amended Complaint (the “*McCann I* Amended Complaint”) just ten (10) days after the written demand. The Amended Complaint asserted the same causes of action as the original Complaint and included a variety of allegations against William McCann, Jr. and Gary Meisner, including: (1) that the Board was paying Gertrude McCann (the mother of Ronald McCann and William McCann, Jr.) an annual consultation fee; (2) that the Board had increased William McCann Jr.’s salary in 1999 to \$144,000 per year; and (3) that Ronald McCann was removed as a director of the Corporation. See *McCann I* Amended Complaint; see also *McCann I* District Court Opinion, pp. 2-5.

The Director Defendants again moved to dismiss the *McCann I* Complaint on grounds that Plaintiff had failed to comply with the demand requirements of I.C. § 30-1-742. Plaintiff opposed the motion to dismiss on grounds that his claims were not derivative, but instead were

direct actions that did not require written notice to the Corporation. The District Court granted the motion to dismiss with prejudice, concluding that the causes of action were derivative and that Plaintiff had failed to comply with the written demand requirements for a derivative action. *See McCann I* District Court Opinion, p. 8 (“The defendants are also correct that the plaintiff, in both complaints, is attempting to assert individual claims which are actually derivative claims on behalf of the Corporation.”).

In dismissing the *McCann I* Complaint, the District Court concluded that Plaintiff should not be permitted to amend his complaint in light of his refusal to follow the statutory written demand requirements:

[B]ecause Plaintiff's counsel failed to follow the dictates of I.C. § 30-1-742 for a second time, this Court is forced to use its discretionary authority to dismiss this action with prejudice. Otherwise, the purpose behind Section 30-1-742 et seq. will be thwarted, and the shareholders will never be forced to cooperate with each other in the corporate context as anticipated by the statute. This Court believes it is only encouraging controversy by allowing this action to proceed, at the cost of the corporation's and the individual parties' pocketbooks.

*Id.* at p. 8.

The Director Defendants then moved for attorneys' fees pursuant to I.C. § 30-1-746, which allows for attorneys' fees in a derivative action where the court finds “that the proceeding was commenced or maintained without reasonable cause or for an improper motive.” The District Court granted the motion for attorneys' fees based on Plaintiff's failure to follow the dictates of I.C. § 30-1-742. *See McCann I* District Court Opinion, p. 10.

Unsatisfied with the District Court's conclusions, Plaintiff appealed the dismissal to the Idaho Supreme Court, again arguing that his claims against the Director Defendants were direct actions, not derivative actions. The Idaho Supreme Court affirmed the District Court's

conclusion that the causes of action against the Director Defendants, including the cause of action for breach of fiduciary duty, could only be brought as a derivative action. *See McCann v. McCann*, 138 Idaho 228, 61 P.3d 585 (2002) (“*McCann I*”). The Idaho Supreme Court further affirmed the dismissal with prejudice and the award of attorneys’ fees, both based on Plaintiff’s failure to comply with the written demand requirements set forth in I.C. § 30-1-742. *Id.* The Idaho Supreme Court also awarded attorneys’ fees and costs on appeal. *Id.*

Now, six years later, Plaintiff has again brought suit against William McCann, Jr. and Gary Meisner as directors of the Corporation. Despite the fact that the Idaho Supreme Court expressly held that his earlier lawsuit for breach of fiduciary duties could only have been brought as a derivative action, Plaintiff has once again brought a claim for breach of fiduciary duties without complying with the written demand requirement set forth in I.C. § 30-1-742. In fact, just as he did in *McCann I*, Plaintiff incredulously asserts that his cause of action for breach of fiduciary duties is an individual cause of action, not a derivative cause of action. *See* Complaint, ¶¶ 28-29. Moreover, the breach of fiduciary duty cause of action is based on the same allegations and legal theories as the claim asserted in *McCann I*, including the payment of consultation fees to Gertrude McCann, the 1999 increase in William McCann Jr.’s salary and the removal of Plaintiff as a director. *See* Complaint, ¶¶ 18-25.

### **III. STANDARD OF REVIEW**

Defendant William McCann, Jr. moves this Court for an Order, pursuant to I.R.C.P. 12(b)(6), I.R.C.P. 23(f), I.C. § 30-1-741 and I.C. § 30-1-742, dismissing Plaintiff’s Complaint. A motion pursuant to I.R.C.P. 12(b)(6) is a motion asserting that the opposing party has failed to state a claim upon which relief can be granted.

“In order to survive a 12(b) motion to dismiss, it is not enough for a complaint to make conclusory allegations.” *Owsley v. Idaho Industrial Comm’n*, 141 Idaho 129, 136, 106 P.3d 455, 462 (2005). “Although the non-movant is entitled to have his factual assertions treated as true, this privilege does not extend to the conclusions of law the non-movant hopes the court to draw from those facts.” *Id.* (citation omitted). “The refusal to allow a plaintiff to amend a complaint, where the record contains no allegations which, if proven, would entitle the plaintiff to the relief claimed, is not an abuse of discretion.” *Wells v. United States Life Ins. Co.*, 119 Idaho 160, 167, 804 P.2d 333, 340 (Ct. App. 1991).

Generally, the only facts which a court may properly consider on a motion to dismiss for failure to state a claim are those appearing in the Complaint. *See Hellickson v. Jenkins*, 118 Idaho 273, 276 (Ct. App. 1990). Under the “incorporation by reference” doctrine, however, the Court is permitted to consider documents “whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff’s] pleading,” without converting a motion to dismiss into a motion for summary judgment. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (applying the analogous Federal Rule of Civil Procedure 12(b)(6)). In addition to documents referenced in the Complaint, the Court may consider documents of which the Court can take judicial notice. *See Tellabs v. Makor Issues & Rights*, 127 S.Ct. 2499, 2509 (2007) (“[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.”). Here, the Court may consider the record in *McCann I*, including the Amended Complaint, the briefing filed in the action, the District Court Opinion and the Supreme Court opinion, both because the record in *McCann I* is referenced in the Complaint

and because this Court may take judicial notice of that court record. *See* Complaint, ¶ 28; *see also* Idaho Rule of Evidence 201(c) (providing that the Court may “[take] judicial notice of records, exhibits, or transcripts from the court file in the same or a separate case”).<sup>1</sup>

#### IV. ARGUMENT

##### A. Res Judicata Bars Plaintiff's Causes Of Action

Res judicata bars Plaintiff from bringing the current action. Res judicata encompasses both claim and issue preclusion (“true” *res judicata* and collateral estoppel, respectively). *C Systems, Inc. v. McGee*, 145 Idaho 559, 561, 181 P.3d 485, 487 (2008). In this case, both of Plaintiff's causes of action are barred by the doctrine of claim preclusion, and Plaintiff's first cause of action is also barred by the doctrine of issue preclusion.

##### 1. Res Judicata (Claim Preclusion) Bars Both Causes Of Action

Plaintiff's causes of action for breach of fiduciary duty and, alternatively, for an equitable remedy short of dissolution are both barred by the doctrine of claim preclusion. Under principles of claim preclusion, a valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. *Aldape v. Akins*, 105 Idaho 254, 256, 668 P.2d 130, 132 (Ct. App. 1983). More specifically, “a valid and final judgment rendered in an action extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose.”

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<sup>1</sup> Defendant hereby moves the Court to take judicial notice of the following documents in the *McCann I* record: (1) the original Complaint, dated June 19, 2000; (2) the Amended Complaint; (3) the Supplemental Memorandum in Support of Plaintiff's Motion to Amend Complaint, filed with the district court in *McCann I* on November 1, 2000; (4) the District Court's Opinion and Order Re: Pending Motions; (5) Appellant's Brief, filed June 8, 2001 with the Idaho Supreme Court; and (6) the Supreme Court's Opinion in *McCann I*. These documents are attached to this Memorandum as Exhibits 1 through 6 respectively.

*Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 150, 804 P.2d 319, 323 (1990). Claim preclusion applies “not only as to every matter offered and received to sustain or defeat the claim but also as to every matter which might and should have been litigated in the first suit. *Joyce v. Murphy Land and Irrigation Co.*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922).

For claim preclusion to bar a subsequent action, three requirements must be satisfied: (1) there must be a valid final judgment rendered on the merits; (2) involving the same parties; and (3) involving the same claim. *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 68, 878 P.2d 762, 767 (1994). In the present case, all three requirements are satisfied.

**a) Final Judgment**

In *McCann I*, 138 Idaho 228, 234, 61 P.3d 585, 591 (2002), the district court ruled that “because Plaintiff’s counsel failed to follow the dictates of I.C. § 30-1-742 for a second time, this Court is forced to use its discretionary authority to dismiss this action with prejudice.” 138 Idaho at 234, 61 P.3d at 591 (emphasis added). The dismissal with prejudice was affirmed by the Idaho Supreme Court. *Id.*, 138 Idaho at 238. This dismissal of an action “with prejudice” is an adjudication on the merits of the plaintiff’s claim. *King v. Lang*, 136 Idaho 905, 912, 42 P.3d 698, 705 (2002). Consequently, there has been a final judgment rendered on the merits by a court of competent jurisdiction, and that final judgment has res judicata effect. *Jensen v. Doherty*, 101 Idaho 910, 911-12, 623 P.2d 1287, 1288-89 (1981).

**b) Same Parties**

In order for claim preclusion to apply, both proceedings must involve the same parties or their privies. *Andre v. Morrow*, 106 Idaho 455, 458 n. 1, 680 P.2d 1355, 1358 n.1 (1984). In both *McCann I* and *McCann II*, the named defendants are William McCann, Jr., Gary Meisner

and McCann Ranch & Livestock Co., and the named Plaintiff is Ronald R. McCann.

Consequently, both proceedings involve the exact same parties.

**c) Same Claim**

When a valid, final judgment is rendered in a proceeding, it “extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose.” *Id.* (citation omitted). The Idaho Supreme Court has held that the “transactional concept of a claim is broad” and that claim preclusion “may apply even where there is not a substantial overlap between the theories advanced in support of a claim, or in the evidence relating to those theories.” *Aldape*, 105 Idaho at 259, 668 P.2d at 135. Whether a factual grouping constitutes a transaction is “to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.” *Id.*

In both *McCann I* and *McCann II*, the “claim” argued by Plaintiff is exactly the same. Plaintiff's claim in *McCann I* was that the actions of the corporation were “benefiting the majority shareholders to the exclusion of Ronald McCann.” *See* Appellant's Brief, p. 3. Similarly now, Plaintiff pleads that defendants “have breached their fiduciary duty by management decisions and artifices which deprive Plaintiff of any real benefit from his more than five million dollar asset and effectively transfer to Bill McCann the benefit of Plaintiff's asset.” Complaint, ¶ 32. In both cases, Plaintiff claims that the Director Defendants are benefiting from their interest in the Corporation while Plaintiff is being excluded. There is no meaningful difference between the claims in *McCann I* and *McCann II*.

Further, in both cases, the “*theories*” advanced in support of Plaintiff’s claim are identical. In *McCann I*, the theories advanced by Plaintiff were “breach of fiduciary duties, negligence by the directors, conversion of corporate property, self-dealing and conflict of interest transactions” of the corporation and the individual directors. *McCann I*, 138 Idaho at 231, 61 P.3d at 588. In this case, the theory advanced in the “Complaint for Equitable Relief and Damages” is based exclusively on breach of fiduciary duties.

Moreover, the “*evidence*,” i.e., the factual allegations, supporting Plaintiff’s current causes of action is almost identical to the allegations asserted in *McCann I*:

<u><b>Allegations in <i>McCann II</i> Complaint</b></u>	<u><b>Allegations raised in <i>McCann I</i></b></u>
William McCann, Jr. “caused his salary to increase from \$48,000 a year to \$144,000 a year, yet he continues to maintain his law practice.” <i>See</i> Complaint, ¶ 18.	“May 1, 1999 . . . the Board doubles Defendant Bill Jr.’s salary to \$144,000 per year.” <i>See McCann I</i> District Court Opinion, p. 2.
“Since McCann Senior’s death, the corporation has been controlled by Defendants Meisner and Bill McCann. These Defendants have not redeemed any of Gertrude’s stock . . .” <i>See</i> Complaint, ¶ 19.	“December 1998 . . . The Board votes to pay Gertrude an annual consultation fee of \$48,000. The Trustee (Meisner) does not redeem any stock.” <i>See McCann I</i> District Court Opinion, p. 2.
“Defendants McCann and Meisner caused the number of directors to be changed, removing Plaintiff from the Board of Directors.” <i>See</i> Complaint, ¶ 20.	“September 6, 2000 . . . The shareholders meet and elect to remove Ronald McCann as a director of the Corporation.” <i>See McCann I</i> District Court Opinion, p. 4.
“Defendant McCann and Meisner have refused to authorize the corporation to employ Plaintiff.” <i>See</i> Complaint, ¶ 21.	“June 9, 1999 . . . The Board declines to hire Ron to help manage the corporation, citing no need for another manager and the apparently poor personal relationship between the brothers.” <i>See McCann I</i> District Court Opinion, p. 2.
“Since Defendants McCann and Meisner assumed control of the corporation, they have refused to declare a reasonable amount of dividends despite sufficient profit and cash	“June 9, 1999 . . . The Board asks directors Durkin and Meisner to investigate whether the Corporation should declare dividends, at Plaintiff’s request . . . September 6, 2000 . . .



<u><b>Allegations in <i>McCann II</i> Complaint</b></u>	<u><b>Allegations raised in <i>McCann I</i></b></u>
flow. Dividends have only been declared three times in the last twelve years.” <i>See</i> Complaint, ¶ 22 – 23.	The Board declines to pay dividends in light of the costs and expenses being incurred in defending the corporation and directors from the Ronald McCann lawsuit.” <i>See McCann I</i> District Court Opinion, p. 2, 5.
“For year 2007, the corporation failed to hold an annual shareholder meeting as called for by the corporate bylaws.” <i>See</i> Complaint, ¶ 4.	
“Rather than declaring dividends, which would benefit Plaintiff, Defendants McCann and Meisner have annually voted for the corporation to engage in phony financial transactions to benefit Gertrude. For example, they have caused the corporation to enter into purchases and/or leases with her concerning her home place and shop. They vote to have the corporation pay substantial bonuses/consulting fees to the elderly woman.” <i>See</i> Complaint, ¶ 5.	“December 1998 . . . . The Board votes to pay Gertrude an annual consultation fee of \$48,000.” <i>See McCann I</i> District Court Opinion, p. 2.

The only factual allegation Plaintiff asserts in support of his current claims that was not asserted in *McCann I* is the alleged failure to hold a shareholder’s meeting in 2007 (Complaint, ¶ 24), which in and of itself is not actionable. *See* I.C. § 30-1-701(3) (“The failure to hold an annual meeting at the time stated in or fixed in accordance with a corporation's bylaws does not affect the validity of any corporate action.”). To the extent that any of the allegations are continuing in nature, those continuing allegations are significantly related in “time, space, origin, [and] motivation” to the allegations raised in *McCann I* and must be considered part of that same transaction under Idaho law. *See Aldape*, 105 Idaho at 259, 668 P.2d at 135. Because this factual grouping constitutes the same transaction, *McCann II* is barred by claim preclusion.

Notably, claim preclusion bars not only the fiduciary duty cause of action, but also the dissolution cause of action Plaintiff asserts in his Complaint. Although not included in the original *McCann I* Complaint, Plaintiff attempted to amend his Complaint in *McCann I* to add a claim for dissolution pursuant to Idaho Code § 30-1-1430. On November 1, 2000, Plaintiff filed a Supplemental Memorandum In Support Of Plaintiff's Motion to Amend Complaint, which attached as Exhibit A a proposed Amended Complaint. That proposed Amended Complaint contained the following request in its prayer for relief:

5. That pursuant to Idaho Code § 30-1-1430(2)(b), McCann Ranch & Livestock Co. be ordered judicially dissolved based upon the oppressive conduct of the controlling shareholder/directors toward the minority shareholder which has caused and is causing irreparable damage to the Corporation.

The District Court ultimately dismissed the *McCann I* Complaint with prejudice and held that Plaintiff would not be allowed to file any amended complaint. Thus Plaintiff has already brought (or at least attempted to bring) his claim for dissolution, and it is now barred by claim preclusion. Even if Plaintiff had not moved to amend his *McCann I* complaint to seek dissolution, Plaintiff's current claim for dissolution is based on the same allegations as the breach of fiduciary duty cause of action in both *McCann I* and *McCann II*. Therefore, it could have been brought in *McCann I* and is now barred by claim preclusion. *See Magic Valley Radiology, P.A. v. Kolouch*, 123 Idaho 434, 437, 849 P.2d 107, 110 (1993) (explaining that claim preclusion applies not only to matters actually litigated, but also as to "every matter which might and should have been litigated in the first suit").

In summary, claim preclusion bars this proceeding because there was a valid final judgment rendered on the merits involving the same parties. Because (1) Plaintiff's claims are identical, (2) the theories advanced in support of Plaintiff's claims are identical, and (3) the

evidence related to those theories is nearly identical and comprise the same series of transactions, the action involves the same claim and Plaintiff's current case is barred by res judicata.

**2. Collateral Estoppel (Issue Preclusion) Bars Relitigation Of Whether Plaintiff's Causes Of Action Are Derivative**

Collateral estoppel, or issue preclusion, may be applied to prior judgments, estopping a party from arguing a finding or verdict that has already been rendered. *Anderson v. City of Pocatello*, 112 Idaho 176, 183, 731 P.2d 171, 177 (1986). Collateral estoppel protects litigants from unnecessary costs by not requiring them to re-litigate identical issues, promotes judicial economy, prevents inconsistent decisions, and provides an incentive for the reliance on adjudications. *See Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1986). As explained in *Navarro v. Yonkers*, 144 Idaho 882, 885, 173 P.3d 1141, 1144 (2007), the test of when collateral estoppel should apply is:

(1) whether the party had a full and fair opportunity to litigate the issue, (2) whether the issue decided in the previous litigation is identical to the current issue presented, (3) whether the issue was actually decided in the previous litigation and whether the issue was necessary to the prior judgment, (4) whether the final judgment was on the merits and (5) whether the party who the judgment is asserted against was a party or in privity with the party to the prior judgment.

*Id.*

A review of the Court's decision in *McCann I* reveals that the central issue upon which Plaintiff argues in this case – whether his claim for breach of fiduciary duties is derivative – is the exact issue already determined by the Court in *McCann I*.

**a) Full And Fair Opportunity To Litigate**

The question of whether a party had a full and fair opportunity to litigate a prior determination involves a practical inquiry into “the realities of litigation.” *Gilberg v. Barbieri*.

53 N.Y.2d 285, 292, 423 N.E.2d 807, 809, 441 N.Y.S.2d 49, 51 (N.Y., 1981). “A comprehensive list of the various factors which should enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation.” *Id.*; *see also* RESTATEMENT JUDGMENTS 2D (TENT. DRAFT NO. 3) § 88. In this case, Plaintiff had a full and fair opportunity to litigate the issue of whether his claims are derivative in nature.

The original action was a major one. Plaintiff charged the defendants with breach of fiduciary duties, and Plaintiff litigated his claims all the way up through the Idaho Supreme Court. In order to bring those claims, Plaintiff fully litigated the question of whether or not he could bring a direct action under those claims, an issue that was addressed by the Idaho Supreme Court extensively in *McCann I*. Because of the high significance of the first case, Plaintiff could reasonably expect or be expected to vigorously litigate the issue – especially where Plaintiff initiated the action. Undoubtedly, Plaintiff was afforded a full and fair opportunity to litigate the prior determination.

**b) Identical Issue**

The issue decided in the previous litigation is identical to the current issue presented. The Idaho Supreme Court ruled in *McCann I* that “the causes of action alleged by Ron were derivative rather than individual in nature.” 138 Idaho at 234, 61 P.3d at 591. However, Plaintiff attempts to argue that “a direct cause of action exists on behalf of a minority shareholder in a closely held corporation against the controlling shareholders/directors if they breach the fiduciary duties they owe to the minority shareholder.” Complaint, ¶ 30. Of course, this is

exactly the same argument that Plaintiff made in *McCann I*, in which he argued “the Trial Court erred in dismissing Ronald McCann’s individual causes of action because Idaho law specifically allows a shareholder in a closely-held corporation to bring a direct action.” Appellant’s Brief, p. 12. Indeed, the Court in *McCann I* even rejected the very same argument Plaintiff now asserts – that his case falls within an exception set forth in *Steelman v. Malory*, 110 Idaho 510, 716 P.2d 1282 (1986). See Complaint, ¶ 30 (asserting that *Steelman* controls this case); Appellant’s Brief, p. 14 (asserting that “[t]he facts of *Steelman* are nearly identical to those before this Court”); and compare *McCann I*, 138 Idaho at 233-34 (distinguishing *Steelman* in concluding that Plaintiff’s claims were derivative). Plaintiff is merely attempting to re-litigate the same issue decided in *McCann I*.

**c) Issue Was “Actually Decided” And “Necessary”**

In cases tried to a judge, express findings of fact and conclusions of law often show clearly what has been – and what has not been – decided. See *U.S. v. Ford*, 371 F.3d 550, 554-56 (9th Cir. 2004). In *McCann I*, the holding of the Idaho Supreme Court was that Plaintiff’s action was derivative in nature and that the failure to follow the procedural requirements for a derivative action requires dismissal. *McCann I*, 138 Idaho at 234, 61 P.3d at 591. Thus, there is no doubt that the issue was decided and necessary to the judgment.

**d) Final Judgment On The Merits**

A judgment on the merits precluding the re-litigation of an issue is one based on the legal rights and liabilities of the parties, as distinguished from judgments based on technical grounds, dilatory objections or contentions, mere matters of form, or matters of practice or procedure. *Wight v. Montana-Dakota Utilities Co.*, 299 F.2d 470 (9th Cir. 1962). In *McCann I*, the issue of

whether Plaintiff must bring a derivative action was the subject of the lawsuit and was decided by the Idaho Supreme Court on the merits.

**e) Same Parties Or Privy**

As discussed *infra*, this element is satisfied because *McCann I* and *McCann II* involve the same parties.

In summary, each of the elements of collateral estoppel is satisfied. Indeed, this is a textbook example of collateral estoppel – Plaintiff is bringing the exact same issue a second time without regard to the Idaho Supreme Court’s decision in *McCann I*. Therefore, Plaintiff is barred from re-litigating whether his breach of fiduciary duty cause of action against Defendants is a derivative action.

**B. Plaintiff’s First Cause Of Action For Breach Of Fiduciary Duties Must Be Dismissed Because The Action Is Derivative, Not Individual**

Plaintiff’s first cause of action asserts that the Direct Defendants have breached certain fiduciary duties. Plaintiff erroneously contends that this action can be brought directly (also referred to as “individually”) rather than derivatively. *See* Complaint, ¶ 29 (“Plaintiff explicitly and solely brings individual causes of action”). However, “[t]o determine whether a complaint states a derivative or an individual cause of action, courts examine the nature of the wrongs alleged in the body of the complaint, not plaintiff’s designation or stated intention.”

*Strassenburgh v. Straubmuller*, 146 N.J. 527, 551, 683 A.2d 818, 830 (1996) (emphasis added).

As the Idaho Supreme Court has already concluded, Plaintiff is required to bring his action derivatively, not directly.

**a) Precedent Under Idaho Case Law**

In *McCann I*, the Idaho Supreme Court recently considered how to determine whether a cause of action is individual or derivative:

[I]t is generally held that a stockholder may maintain an action in his own right for an injury directly affecting him, although the corporation also may have a cause of action growing out of the same wrong, where it appears that the injury to the stockholder resulted from the violation of some special duty owed to the stockholder by the wrongdoer and having its origin in circumstances independent of the plaintiff's status as a shareholder.

....

A stockholder's derivative action is an action brought by one or more stockholders of a corporation to enforce a corporate right or remedy a wrong to the corporation in cases where the corporation, because it is controlled by the wrongdoers or for other reasons fails and refuses to take appropriate action for its own protection . . . .

An action brought by a shareholder is derivative if the gravamen of the complaint is the injury to the corporation or to the whole body of its stock or property and not injury to the plaintiff's individual interest as a stockholder.

*McCann I*, 138 Idaho at 233 (citing 19 AM.JUR.2D *Corporations* §§ 2249-2250 (1986)).

The Court went on to determine that the claims Plaintiff brought in that case, including his claim for breach of fiduciary duties, were derivative claims rather than individual ones:

The duties that Ron has alleged the directors breached in this case do not appear to be a “special duty owed to the stockholder by the wrongdoer and having its origin in circumstances independent of the plaintiff's status as a shareholder.” Ron's allegations appear to be more that the corporation is “controlled by the wrongdoers or for other reasons fails and refuses to take appropriate action for its own protection.”

Accordingly, the nature of this action should be considered a derivative suit. Even if there is some potential injury to Ron, Ron's alleged injuries appear to be dependent on his status as a shareholder, and solely an injury to the corporation but not to him personally as an individual.

*Id.* at 233-34.

The same analysis applies here. Plaintiff has alleged only injury that is “dependent on his status as a shareholder” and is “solely an injury to the corporation but not to him personally as an

individual.” *Id.* For instance, if Defendants have caused the corporation to “engage in phony financial transactions” (*see* Complaint ¶ 25), or if it was improper for Defendant McCann’s salary to be increased (*see* Complaint ¶ 18), then the injury is an injury to the Corporation whose resources Defendants wrongfully used – and Plaintiff suffers only because, by reason thereof, his shares of stock in the corporation have been purportedly devalued.

**b) The Purported *Steelman* Exception Does Not Apply**

Tacitly acknowledging that the first cause of action should be brought derivatively, Plaintiff asserts that *Steelman* establishes an exception that allows Plaintiff to bring suit directly. Complaint, ¶ 30 (“The Idaho Supreme Court held in [*Steelman*] that a direct cause of action exists on behalf of a minority shareholder in a closely held corporation against the controlling shareholders/directors if they breach the fiduciary duties they owe to the minority shareholder.”). *Steelman*, however, does not apply under the set of facts alleged by Plaintiff and furthermore does not stand for the principal of law that Plaintiff claims it to.

In *Steelman*, three individuals formed and contributed assets to a corporation and became the corporation’s three directors and three employees. *Steelman*, 110 Idaho at 511-12, 716 P.2d at 1283-84. Two of the shareholders then decided to fire the third shareholder and to double the wages that the two controlling shareholders would be paid. *Id.* Shortly thereafter, the business became insolvent and the two controlling shareholders began usurping corporate opportunities for their own personal benefit. *Id.* The court found the conduct of the two controlling shareholders “egregious” and held that they had breached their fiduciary duties towards the third shareholder. *Id.*, 110 Idaho at 514, 716 P.2d at 1286.

The facts as pled by Plaintiff bear little resemblance to those in *Steelman*. Plaintiff has not alleged he contributed any assets to the Corporation. Plaintiff has not alleged that



Defendants and Plaintiff had agreed to operate the Corporation as a partnership. Plaintiff has not alleged that Defendants have usurped any corporate opportunity of the Corporation. Plaintiff has not alleged that the future value of Plaintiff's shares of stock in the Corporation has been reduced or eliminated. Whereas the conduct of the controlling shareholders in *Steelman* violated all notions of justice and fair dealing, Plaintiff has alleged no such conduct on the part of Defendants. Rather, Plaintiff has merely alleged that, as a result of Defendants' actions, Plaintiff's shares of stock in the Corporation are illiquid and do not currently generate significant cash flow to Plaintiff. Because *Steelman* is factually distinguishable from the situation here as pled by Plaintiff, *Steelman* does not apply here to provide Plaintiff with a direct cause of action.

Furthermore, Plaintiff has stated too broadly the application of *Steelman*. The Idaho Supreme Court in *McCann I* narrowly characterized *Steelman* as follows:

In *Steelman v. Mallory*, a direct action was allowed where the directors breached their fiduciary duty by usurping a corporate opportunity that could have and would have been performed by the corporation but for a disagreement amongst the directors. This Court held that in a closely-held corporation, the corporate directors owe a fiduciary duty to one another, to the corporation, and to the shareholders, including the minority shareholders.

*McCann I*, 138 Idaho at 233, 61 P.3d at 590 (citations omitted). Thus, *Steelman* does not stand for the principle that a shareholder can bring a direct cause of action against "controlling shareholders/directors" for breaching any fiduciary duty. Instead, *Steelman* stands for the much narrower principle that a shareholder can bring a direct cause of action against a director that breaches his or her fiduciary duty by "usurping a corporate opportunity that could have and would have been performed by the corporation but for the disagreement amongst the directors." *Id.*

Indeed, the Idaho Supreme Court has even more recently affirmed the narrowness of the *Steelman* decision by continuing to conclude that a cause of action for breach of fiduciary duties is derivative:

Mannos also alleges that the defendants breached numerous fiduciary duties owed to him after he became a shareholder; namely that the defendants converted Peterbilt assets for certain personal uses. Mannos' attempt to bring these claims as a direct action is misplaced. Any claim that Mannos has regarding the defendants' depletion of corporate assets can only be pursued by him through a derivative action.

*Mannos v. Moss*, 143 Idaho 927, 933, 155 P.3d 1166, 1172 (2007) (citing *McCann I*).

*Steelman* created a narrow exception to the general rule that shareholders must bring suit against directors derivatively – but Plaintiff's first cause of action does not fall within this narrow exception. Therefore, *Steelman* does not provide Plaintiff the right to bring the first cause of action directly. Moreover, as explained above, the Idaho Supreme Court has already held that Plaintiff's cause of action for breach of fiduciary duty is a derivative cause of action, and the Court specifically distinguished *Steelman* in reaching this conclusion. Thus, Plaintiff is collaterally estopped from relitigating the issue of whether his breach of fiduciary duty cause of action is derivative.

**c) Plaintiff Failed To Comply With The Pleading, Standing And Demand Requirements Of A Derivative Action**

A review of applicable law and the Complaint establishes that Plaintiff has failed to comply with the pleading, standing and demand requirements set forth in I.C. §§ 30-1-741 and -742 and I.R.C.P. 23(f).

I.R.C.P. 23(f) provides that:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having

failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the state of Idaho which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action which plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort.

Several allegations are required here that Plaintiff has not made. Most significantly, Plaintiff fails to allege the efforts made by Plaintiff to obtain the action that Plaintiff desires from the directors or shareholders, and the reasons for Plaintiff's failure to obtain the action or for not making the effort. Because Plaintiff has failed to make the allegations required under I.R.C.P. 23(f), Plaintiff cannot commence or maintain a derivative proceeding and thus the first cause of action must be dismissed.

It is well-established, under the federal rule of civil procedure analogous to I.R.C.P. 23(f), that the maintenance of a derivative suit requires a derivative plaintiff to "satisfy more stringent pleading requirements than the notice pleading regime of other Rules 8 and 12(b)(6)." *Stepak v. Addison*, 20 F.3d 398, 402 (11th Cir. 1994). Compliance with such rules is mandatory and the failure to make the required allegations constitutes a fatal defect which warrants the dismissal of the complaint for failure to state a claim upon which relief can be granted. See 19 AM. JUR. 2D *Corporations* § 2436; see also *Cramer v. General Tel. & Electronics Corp.*, 582 F.2d 259 (3d Cir. 1978); *Shelnsky v. B.R. Dorsey*, 574 F.2d 131 (3d Cir. 1978).

In the case of *Kerner v. Johnson*, 99 Idaho 433, 583 P.2d 360 (1978), the Idaho Supreme Court stated that the plaintiff's action could not be maintained as a class or derivative action because the plaintiff had failed to satisfy the prerequisites and conditions stated in I.R.C.P. 23(a), (b) and (f).

Idaho Code § 30-1-742 further provides that:

No shareholder may commence a derivative proceeding until:

(1) A written demand has been made upon the corporation to take suitable action; and

(2) Ninety (90) days have expired from the date the demand was made unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the ninety (90) day period.

Plaintiff has failed to allege that Plaintiff has made any written demand upon the Corporation to take suitable action. Plaintiff has also failed to allege that 90 days have expired from the date of any demand or that irreparable injury to Nominal Defendant would result by waiting for the expiration of a 90-day period. Because Plaintiff has failed to make the allegations required under I.C. § 30-1-742, Plaintiff cannot commence a derivative proceeding and thus the first cause of action must be dismissed. *McCann v. McCann*, 138 Idaho 228, 61 P.3d 585 (2002).

**C. Plaintiff's Second Cause Of Action Should Be Dismissed**

Plaintiff pleads a second, alternative cause of action for equitable relief under I.C. § 30-1-1430. See Complaint ¶¶ 34-40. This second cause of action should be dismissed on the following alternative grounds.

**1. Plaintiff's Second Cause Of Action Should Be Dismissed Because Plaintiff Has Failed To Plead Facts Satisfying All Elements Of The Dissolution Statute**

Plaintiff asserts that Plaintiff is entitled to relief under I.C. § 30-1-1430. That statute provides that:

The Idaho district court... may dissolve a corporation:

....

(2) In a proceeding by a shareholder if it is established that:

....

(b) The directors or those in control of the corporation have acted or are acting in a manner that is illegal, oppressive or fraudulent, and irreparable injury to the corporation is threatened or being suffered by reason thereof...

*Id.* (emphasis added).

Thus, there are two elements that must be present here for this Court to have the discretion to dissolve Nominal Defendant: (i) Defendants must have acted or be acting in a manner that is illegal, oppressive, or fraudulent, and (ii) as a result of such conduct, irreparable injury to the corporation must be threatened or in fact be suffered. *Id.* With respect to the first element, the Complaint adequately alleges “oppressive” conduct by Defendants. *See* Complaint, ¶ 37.

The second element of the statute, however – the requirement that “irreparable injury to the corporation” be threatened or suffered as a result of Defendants’ alleged conduct – has not been met. Plaintiff alleges that the Corporation “does not provide benefits to its shareholders consistent with their reasonable expectations. This does threaten irreparable harm to the corporation.” Complaint, ¶ 38. Plaintiff, however, offers no logical connection between “shareholders” not having their “reasonable expectations” met and the supposed threat of

irreparable harm to the Corporation. Furthermore, nowhere in the Complaint does Plaintiff allege any facts that could be construed to establish the threat of irreparable harm to the Corporation. In short, Plaintiff has made a conclusory allegation unsupported by logic or evidence – precisely the form of allegation that the court in *Owsley* referred to when it stated that “in order to survive a 12(b) motion to dismiss, it is not enough for a complaint to make conclusory allegations.” *Owsley*, 141 Idaho 129, 136, 106 P.3d 455, 462. Because Plaintiff’s allegations fail to satisfy the “irreparable injury to the corporation” element of I.C. § 30-1-1430, Plaintiff’s second cause of action must be dismissed. Indeed, Plaintiff essentially admits as much by arguing that the “irreparable injury to the corporation” requirement does not apply to the Corporation at issue in this case.

**2. Plaintiff’s Second Cause Of Action Should Be Dismissed Because There Is No Exception For Publicly Traded Companies Under The Dissolution Statute.**

Given that Plaintiff cannot seek equitable relief under I.C. § 30-1-1430 without showing that irreparable harm against the Corporation is threatened or being suffered – a showing that is conspicuously absent – Plaintiff attempts to argue that irreparable harm is not really required. See Complaint, ¶ 39 (“A review of the history of the Idaho dissolution statutes indicates that the clause ‘irreparable damage’ is limited in application to publicly traded corporations and should not apply to block an equitable remedy for a shareholder in a closely held corporation who can establish oppression”). In support of this claim, Plaintiff argues that the statute should be construed in light of the statute’s “history,” but Plaintiff does not allege what this history is.

The Idaho Supreme Court has summarized as follows how to interpret a statute:

The interpretation of a statute is a question of law over which we exercise free review. It must begin with the literal words of the statute, those words must be given their plain, usual, and ordinary meaning, and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply

follows the law as written. Unless the result is palpably absurd, we must assume that the legislature means what is clearly stated in the statute. If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial.

*State v. Thompson*, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004) (citations omitted).

The portion of I.C. § 30-1-1430 implicated by the Complaint, and which is recited above, is not ambiguous. The “literal words of the statute,” “given their plain, usual, and ordinary meaning,” and “construed as a whole,” plainly provide that (i) an Idaho district court, (ii) in a proceeding by a shareholder, (iii) may dissolve a corporation if (iv) it is established that (a) the directors or those in control of the corporation have acted or are acting illegally, oppressively, or fraudulently, and (b) as a result thereof, irreparable injury to the corporation is threatened or being suffered. The language of the statute allows for no alternative construction.

Given that the relevant portion of I.C. § 30-1-1430 is unambiguous, a court must simply follow the statute as it is written. *Thompson*, 140 Idaho at 798, 102 P.3d at 1117. Unless the result is “palpably absurd,” a court must assume that “the legislature means what is clearly stated in the statute.” *Id.* The “history” of the statute is therefore irrelevant.

Idaho Code § 30-1-1430 as written is not limited to publicly traded corporations as asserted by Plaintiff. Therefore, Plaintiff’s allegations fail to satisfy the elements of I.C. § 30-1-1430, and Plaintiff’s second cause of action must be dismissed.

**3. Plaintiff’s Second Cause Of Action Should Be Dismissed Because The Court Does Not Have Authority To Grant Equitable Relief Other Than Dissolution In Connection With the Alleged Oppression.**

Plaintiff claims that “Idaho District Courts have equitable power to provide a remedy to a shareholder of a closely held corporation who establishes oppression, including the remedy of a forced buyout of his shares for their fair market value.” Complaint, ¶ 40. The equitable relief that Plaintiff specifically requests is an “equitable reorganization” involving redemption of

Plaintiff's stock in the Corporation. *See* Complaint, Prayer for Relief, ¶ 1. Plaintiff cites no authority to support the claim that this Court can grant such equitable relief.

Idaho Code § 30-1-1430 is unambiguous and therefore to be followed as written. Under a plain reading of I.C. § 30-1-1430, the only equitable solution authorized to the courts by the Idaho legislature to remedy "oppressive" conduct is dissolution. In other words, courts do not have the authority under I.C. § 30-1-1430 to provide the equitable relief requested by Plaintiff.

Courts in other states have held that, in the absence of specific statutory authorization for remedies other than dissolution, dissolution is the only relief available. *See, e.g., Harkey v. Mobley*, 552 S.W.2d 79 (Mo. App. 1977); *Gruenberg v. Goldmine Plantation, Inc.*, 360 So.2d 884 (La. App. 1978) ("[O]ur substantive law provides for involuntary dissolution but offers no remedy for the minority shareholder with substantial holdings who is out of control and trapped in a closed corporation. We will not arrogate the legislative function to provide relief.").

In a few jurisdictions, an alternative remedy is provided for by statute in the form of a court-ordered buyout for "the fair value" of the minority holder's shares. For example, in Minnesota, the state legislature expressly granted the courts the ability to order a fair value buyout. MINN. STAT. § 302A.571, *subd.* 2. The Idaho legislature presumably had the knowledge of other state legislatures that have authorized courts to order an equitable solution short of dissolution, but chose instead to withhold such authority from the courts. Because this Court is not authorized to order an "equitable reorganization" of the Corporation or redemption of Plaintiff's shares of stock, Plaintiff's second cause of action and request for equitable relief must be dismissed.



**D. Dismissal Should Be With Prejudice, Without Leave To Amend**

In light of Plaintiff's repeated attempts to bring derivative claims as direct causes of action, the dismissal of Plaintiff's claims should be with prejudice and without leave to amend. This is the same conclusion reached by the trial court in *McCann I* and affirmed by the Idaho Supreme Court:

[B]ecause Plaintiff's counsel failed to follow the dictates of I.C. § 30-1-742 for a second time, this Court is forced to use its discretionary authority to dismiss this action with prejudice. Otherwise, the purpose behind Section 30-1-742 et seq. will be thwarted, and the shareholders will never be forced to cooperate with each other in the corporate context as anticipated by the statute. This Court believes it is only encouraging controversy by allowing this action to proceed, at the cost of the corporation's and the individual parties' pocketbooks.

*McCann I*, 138 Idaho at 234.

The same analysis applies here, only the justification for dismissal with prejudice is even stronger given that this is Plaintiff's third refusal to follow the dictates of I.C. § 30-1-742.

**E. An Award Of Attorneys' Fees Is Appropriate**

Should this Court dismiss the Complaint, this Defendant is entitled to an award of attorneys' fees and costs under I.C. § 12-121, § 30-1-746, and I.R.C.P. 54(e)(1).

Idaho Code § 30-1-746 provides:

Payment of Expenses. On termination of the derivative proceeding the court may:

....

(2) Order the plaintiff to pay any defendant's reasonable expenses, including counsel fees, incurred in defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose; or

(3) Order a party to pay an opposing party's reasonable expenses, including counsel fees, incurred because of the filing of a pleading,

motion or other paper, if it finds that the pleading, motion or other paper was not well grounded in fact, after reasonable inquiry, or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law and was interposed for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

*Id*; see also *Mannos v. Moss*, 143 Idaho 927, 937, 155 P.3d 1166, 1176 (2007) (awarding attorneys' fees pursuant to I.C. § 30-1-746 where the plaintiff attempted to bring as a direct action claims for breach of fiduciary duty that could only be brought through a derivative action); *McCann I*, 138 Idaho at 238.

This Defendant has spent a considerable amount of time defending what amounts to a frivolous suit that was brought and pursued without foundation and is not well grounded in fact or existing law or a good faith argument for the extension, modification or reversal of existing law. Defendant has incurred attorneys' fees and costs in defending a complaint that was filed without performing the necessary research to ascertain the proper derivative action pleading requirements.

Attorneys' fees are particularly appropriate in this case given that this is the second time Plaintiff has attempted to bring this derivative action as a direct action. The Idaho Supreme Court has already held that Plaintiff's action cannot be brought as an individual action. In reaching this conclusion, the Idaho Supreme Court also affirmed the trial court's assessment of attorney's fees pursuant to I.C. § 30-1-746 because plaintiff "repeatedly sought to circumvent the requirements of I.C. § 30-1-742." *McCann I*, 138 Idaho at 238. Given that attorneys' fees were appropriate in *McCann I*, they are even more appropriate in *McCann II*. The frivolous nature of this action and the Plaintiff's refusal to abide by the conclusions of the Idaho Supreme Court also make attorneys' fees appropriate under Idaho Code § 12-121.

Upon dismissal of the action, Defendant is entitled to recover the amount of attorneys' fees and costs incurred by Defendant pursuant to I.C. § 12-121, § 30-1-746 and I.R.C.P. 54(e)(1).

#### V. CONCLUSION

For the reasons set forth above, this Court should dismiss the Complaint filed in this matter with prejudice and award this Defendant his costs and attorneys' fees.

RESPECTFULLY SUBMITTED THIS 14<sup>th</sup> day of July, 2008.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

Merlyn W. Clark, ISB No. 1026  
Attorneys for Defendant William V. McCann,  
Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14<sup>th</sup> day of July, 2008, I caused to be served a true copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISMISS by the method indicated below, and addressed to each of the following:

Timoth Esser  
Libey, Ensley, Esser & Nelson  
520 East Main Street  
Pullman, Washington 99163  
[Attorneys for Plaintiff]

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☒ Telecopy  
☒ Email

Andrew Schwam  
Schwam Law Firm  
514 South Polk #6  
Moscow, Idaho 83843  
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid  
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☒ Email

Michael E. McNichols  
CLEMENTS BROWN  
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Lewiston, ID 83501-1510  
[Attorneys for Defendant Gary Meisner]

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Charles F. McDevitt  
McDEVITT MILLER  
420 West Bannock  
P.O. Box 2564  
Boise, ID 83701  
[Attorneys for Nominal Defendant]

☐ U.S. Mail, Postage Prepaid  
☐ Hand Delivered  
☐ Overnight Mail  
☐ Telecopy  
☒ Email

  
\_\_\_\_\_  
Merlyn W. Clark

# EXHIBIT 1

FILED

'00 JUN 19 PM 4 45

CLERK OF DISTRICT COURT  
*Cham*

TAMARA W. MUROCK  
WINSTON & CASHATT  
250 Northwest Boulevard  
Suite 107A  
Coeur d'Alene, Idaho 83814  
Telephone: (208) 667-2103

Attorneys for Plaintiff

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN, individually and  
as a shareholder of McCANN RANCH &  
LIVESTOCK CO.,

Plaintiff,

vs.

WILLIAM V. McCANN, JR., as an  
officer, director and shareholder of  
McCANN RANCH & LIVESTOCK CO.,  
GARY E. MEISNER, Trustee of  
the WILLIAM V. McCANN, SR.  
STOCK TRUST, and as a director and  
shareholder of McCANN RANCH &  
LIVESTOCK CO., and McCANN  
RANCH & LIVESTOCK, CO., an Idaho  
Corporation,

Defendants.

No. CV00-01111

COMPLAINT FOR DAMAGES FOR  
RECOVERY OF CORPORATE PROPERTY,  
BREACH OF FIDUCIARY DUTIES,  
NEGLIGENCE, CONVERSION, SELF-  
DEALING, AND CONFLICTING  
INTEREST TRANSACTIONS

Fee Category  
A(1)  
Fee \$77.00

Plaintiff complains of defendants and alleges as follows:

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

58  
LAW OFFICES OF  
*Winston & Cashatt*  
250 NORTHWEST BLVD., SUITE 107A  
COEUR D'ALENE, IDAHO 83814  
(208) 667-2103  
FAX (208) 765-2121

I  
JURISDICTION AND VENUE

1.1 The causes of action arise in Nez Perce County, Idaho, in that all the acts and transactions constituting alleged breaches involve directors, shareholders, and officers of McCann Ranch & Livestock Co., an Idaho corporation doing business in Nez Perce County, Idaho.

II  
PARTIES

2.1 Plaintiff is an individual residing in Nez Perce County, Idaho, and a 36.7% shareholder of McCann Ranch & Livestock Co. This action is brought by plaintiff individually and as a derivative action pursuant to Idaho Code §§ 30-1-740 through 30-1-746.

2.2 Plaintiff is informed and believes, and thereon alleges, that defendant William V. McCann, Jr. is an individual residing in Nez Perce County, Idaho, a director, officer and a 36.7% shareholder of McCann Ranch & Livestock Co.

2.3 Plaintiff is informed and believes, and thereon alleges, that defendant Gary E. Meisner, is the Trustee of the William V. McCann, Sr. Stock Trust, and a director of the McCann Ranch & Livestock Co. The William V. McCann, Sr. Stock Trust is a 26.6% shareholder of McCann Ranch & Livestock Co.

2.4 Plaintiff is informed and believes, and thereon alleges, that defendant McCann Ranch & Livestock, Co. (the "Corporation"), is a corporation duly authorized to conduct business in the state of Idaho, with its principal place of business in Nez Perce County, Idaho.

III  
GENERAL ALLEGATIONS

3.1 Plaintiff and Defendant William V. McCann, Jr. are the children of Anna Gertrude McCann and William V. McCann, Sr., deceased.

1 3.2 William V. McCann, Sr. died on October 27, 1997.

2 3.3 The William V. McCann, Sr. Stock Trust (the "Trust") was created under Article VIII  
3 of the Last Will and Testament of William V. McCann, Sr. (the "Will"), dated May 6, 1996.  
4 Defendant Gary E. Meisner was appointed trustee. A true and correct copy of the Last Will and  
5 Testament of William V. McCann, Sr., is attached hereto as Exhibit "A."

6 3.4 Pursuant to Article VI of the Will, Mr. McCann, Sr.'s 66,600 shares of common stock  
7 of the Corporation were bequeathed and devised to defendant Meisner as trustee of the Trust.

8 3.5 Article VIII of the Will directed defendant Meisner to administer the Trust pursuant  
9 to the following instructions:

10 (a) To hold, manage and control the trust property, collect the income therefrom,  
11 and out of the same to pay all taxes and other incidental expenses of the trust;

12 (b) To pay the estate and inheritance taxes due at the time of Mr. McCann, Sr.'s  
13 death by selling (redeeming) to the Corporation whatever shares of stock are necessary to  
14 enable the estate to pay said taxes;

15 (c) To vote the Corporation's stock so as to create an income insofar as possible  
16 for Mr. McCann, Sr.'s wife, Anna Gertrude McCann ("Mrs. McCann");

17 (d) To pay and apply the trust income for the benefit of Mrs. McCann; and

18 (e) To distribute the Corporation's stock plus any accumulated income to  
19 defendant William McCann, Jr. upon the death of Mrs. McCann.

20 3.6 Plaintiff is informed and believes, and thereon alleges, that at the time of Mr  
21 McCann, Sr.'s death, the estate owed United States Estate Tax in the amount of \$167,384, and Idaho  
22  
23  
24  
25  
26

S...

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

LAW OFFICES OF *Winston & Bashatt*  
250 NORTHWEST BLVD., SUITE 107A  
COEUR D'ALENE, IDAHO 83814  
(208) 667-2103  
FAX (208) 785-2121



1 Estate Tax in the amount of \$32,994. Contrary to the terms of the Will, the funds to pay the taxes  
2 were not obtained from a redemption of the Trust's stock.

3 3.7 In an effort to prevent a depletion of defendant William McCann, Jr.'s future stock  
4 ownership, the defendants, in their positions as directors, shareholders and an officer, improperly  
5 caused the Corporation to loan in excess of \$337,000 to the estate for the payment of estate and  
6 inheritance taxes.  
7

8 3.8 The defendants' conduct in causing the Corporation to loan in excess of \$337,000 to  
9 the estate for the payment of estate and inheritance taxes is a violation of the terms of the Will, and is  
10 not in the best interests of the Corporation and/or plaintiff.

11 3.9 Plaintiff is informed and believes, and thereon alleges, that throughout the term of the  
12 Trust's administration, the Trust's primary beneficiary, Mrs. McCann, has required the use of trust  
13 income. Contrary to the terms of the Will, this income was not obtained from the trustee's vote on  
14 the corporate stock so as to create an income insofar as possible for Mrs. McCann.  
15

16 3.10 In an effort to prevent a depletion of defendant William McCann, Jr.'s future stock  
17 ownership, the defendants, in their positions as directors, shareholders and an officer, improperly  
18 caused the Corporation to loan \$81,000 to Mrs. McCann in the form of an Officer's Account  
19 Receivable, and to pay a wage to Mrs. McCann under the guise of a consulting fee in the amount of  
20 \$48,000 per year.  
21

22 3.11 The defendants' conduct in causing the Corporation to loan \$81,000 and pay a wage  
23 of \$48,000 per year to Mrs. McCann is a violation of the terms of the Will, and is not in the best  
24 interests of the Corporation and/or plaintiff.  
25  
26

1 3.12 Plaintiff is informed and believes, and thereon alleges, that defendants have  
2 improperly caused the expenditure of substantial corporate funds for the purchase of vehicles  
3 insurance, homes, and other gifts for defendant William McCann, Jr., his family and his friends  
4 including but not limited to:

5 (a) Corporate expenditures at B&B Auto Brite including but not limited to:

6 (i) Expenditures totaling \$234.35 made by defendant William McCann  
7 Jr. for his Mercedes;

8 (ii) Expenditures totaling \$181.30 made by Chantell Hoisington for her  
9 personal vehicle;

10 (iii) Expenditures totaling \$80.65 made by Gertrude McCann for her  
11 personal vehicles;

12 (iv) Expenditures totaling \$12.95 made by Jason Beck for his personal  
13 vehicle;

14 (v) Expenditures totaling \$24.94 made by Aaron Beck for his personal  
15 vehicle;

16 (vi) Expenditures totaling \$12.95 made by Bill Skelton; and

17 (vii) Expenditures totaling \$69.95 made by William V. McCann, III.

18 (b) Corporate expenditures at Brunel Tire and Auto Service Center including but  
19 not limited to:

20 (i) Expenditures totaling \$256.15 made by Howard Hoffman for his  
21 personal vehicle;

- (ii) Expenditures totaling \$707.03 made by Gertrude McCann for her Honda, Mercedes and truck;
- (iii) Expenditures totaling \$23.05 made by defendant William McCann, Jr. for his personal vehicle;
- (iv) Expenditures totaling \$459.46 made by William V. McCann III for a Mazda truck;
- (v) Expenditures totaling \$291.61 made by defendant William McCann, Jr.'s stepson's vehicle;
- (vi) Expenditures totaling \$303.13 for a 1989 Ford Escort, license number 1L50910; and
- (vii) Expenditures totaling \$220.70 for a Toyota 4x4, license number N46992 owned by Casey and Company.
- (c) Corporate expenditures at Forest Auto Wrecking including but not limited to:
- (i) Expenditures totaling \$417.50 for a Ford Escort engine and miscellaneous Probe parts;
- (ii) Expenditures totaling \$16.90 for a Mazda B2200 tailgate handle assembly;
- (iii) Expenditures totaling \$367.50 for a 1990 Toyota truck transmission;
- (iv) Expenditures totaling \$52.50 for a truck alternator;
- (v) Expenditures totaling \$78.75 for a 1984 Plymouth minivan quarter window; and
- (vi) Expenditures totaling \$131.25 for a Ford van rear bumper.

1 (d) Corporate expenditures at Schrader's Truck and Auto Repair including but not  
2 limited to:

3 (i) Expenditures totaling \$260.54 for a 1991 Toyota 4x4;

4 (ii) Expenditures totaling \$260.54 for a Mazda truck;

5 (iii) Expenditures totaling \$79.10 for a Ford van; and

6 (iv) Expenditures totaling \$379.49 for a 1990 Ford truck.

7  
8 (e) Corporate expenditures at Master's Body Shop including but not limited to an  
9 expenditure in the amount of \$120.00 for work on a 1998 Chevy, license number N5332T.

10 (f) Corporate expenditures at Auto Trim and Design including but not limited to  
11 an expenditure in the amount of \$92.40 for work on a 1998 Chevy, license number N5332T.

12 (g) Corporate expenditures at Bann & Bann Auto Service including but no  
13 limited to an expenditure by William V. McCann III in an the amount of \$198.52.

14  
15 3.13 Plaintiff is informed and believes, and thereon alleges, that defendants have  
16 improperly caused the expenditure of substantial corporate funds for the payment of compensation  
17 and other benefits to defendant William McCann, Jr., his family, and his friends of which were not  
18 properly payable.

19  
20 3.14 Plaintiff is informed and believes, and thereon alleges, that defendants have caused  
21 the use and payment of corporate employees for the performance of work other than company work  
22 including but not limited to:

23 (a) Payment of corporate employee, Larry Watkins, for work performed at the  
24 Garden City Apartments for 30 hours on one time card and 25 hours on another;

1 (b) Payment of corporate employee, Matt Albright, for performing sewer work at  
2 704 Castle Street which is owned by Lori McCann, for 43 hours on or about August 12,  
3 1999; and

4 (c) Payment of corporate employee, Joe Heing, for performing sewer work at 704  
5 Castle Street on company time.

6  
7 3.15 Plaintiff is informed and believes, and thereon alleges, that defendants have  
8 improperly caused the use of corporate property for the personal benefit of defendant William  
9 McCann, Jr., his family and his friends, including but not limited to the use of the Corporation's  
10 black stock truck by defendant for personal storage, and thereby causing the Corporation to incur  
11 additional expenses by hiring out the hauling of company livestock.

12  
13 3.16 Plaintiff is informed and believes, and thereon alleges, that defendants, in their  
14 capacity as directors, shareholders and an officer of the Corporation, entered into various  
15 transactions improperly benefiting defendant William McCann, Jr., his family, and his friends.

16  
17 3.17 Plaintiff is informed and believes, and thereon alleges, that defendants caused the  
18 Corporation to enter into various logging contracts for the logging of timber on corporate property,  
19 and that such logging is substantially depleting the value of the property. Despite plaintiff's repeated  
20 protests, and defendants' assurances that the logging would be suspended, defendants have caused  
21 the logging to continue to the detriment of the Corporation and plaintiff.

22  
23 3.18 Plaintiff is informed and believes, and thereon alleges, that defendants caused  
24 corporate payments for monthly inspection services by DBS to be improperly reflected on a 1999  
25 Form 1099 as miscellaneous payments in the amount of \$19,476.00, and on a 1998 Form 1099 as  
26 miscellaneous payments in the amount of \$34,908.00. The corporate checks in payment for such

1 services were endorsed "DBS - Bill Skelton," and Mr. Skelton has been identified as a supervisor at  
2 the Corporation. As such, Mr. Skelton is an employee of the corporation, and the corporation should  
3 have reported his compensation on a Form W-2, and paid the applicable employment taxes in respect  
4 to such compensation.

5 3.19 The defendants' above-described actions and conduct were undertaken for the  
6 personal benefit of defendant William McCann, Jr., his family and his friends, and are not in the best  
7 interests of the Corporation and/or plaintiff.  
8

9 3.20 On or about December 6, 1999, January 21, 2000 and June 9, 2000, plaintiff made  
10 written demands upon the Corporation by and through its attorney, Cumer L. Green, to take suitable  
11 action to remedy the defendants' breaches alleged herein. A true and correct copy of the written  
12 demands are attached hereto as Exhibit "B."  
13

14 3.21 Despite plaintiff's repeated demands, defendants continue to engage in the above-  
15 described actions and conduct, and have otherwise rejected plaintiff's demands.  
16

17 IV  
18 FIRST CLAIM  
19 Breach of Fiduciary Duties

20 4.1. Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
21 through 3 above.

22 4.2 As shareholders, directors, and an officer of the Corporation, defendants owe the  
23 Corporation and plaintiff fiduciary duties.

24 4.3 Defendants' above-described actions and conduct constitute breach of the fiduciar  
25 duties owed by defendants to the Corporation and plaintiff.  
26

4.4 As a proximate result of defendants' breach, the Corporation and plaintiff have been damaged in an amount to be proven at trial.

V  
SECOND CLAIM  
Negligence

5.1 Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 through 4 above.

5.2 Defendants' above-described actions and conduct constitute breach of defendants' obligations under Idaho Code §§ 30-1-830 and 30-1-842, to discharge their duties as directors and as an officer in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner they reasonably believe to be in the best interests of the Corporation.

5.3 As a proximate result of defendants' breach, the Corporation and plaintiff have been damaged in an amount to be proven at trial.

VI  
THIRD CLAIM  
Conversion

6.1 Plaintiff realleges and incorporates by reference the allegations of Paragraphs through 5 above.

6.2 As set forth above, defendants improperly caused the use of corporate property and expenditure of corporate funds for the purchase of gifts and payment of improper salaries for the personal benefit of defendant William McCann, Jr., his family, and his friends.

6.3 Defendants were unjustified in converting corporate funds and property for the personal benefit of defendant William McCann, Jr., his family, and his friends.

6.4 Defendants' conduct constitutes conversion of corporate funds and property.

6.5 The Corporation and plaintiff are rightfully entitled to corporate funds and property converted in an amount to be proven at trial.

VII  
FOURTH CLAIM  
Self-Dealing

7.1 Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 through 6 above.

7.2 As set forth above, defendants engaged in various actions and conduct, entered into various transactions on behalf of the Corporation, and otherwise utilized corporate funds and property for the purpose of personally benefiting defendant William McCann, Jr., his family, and his friends.

7.3 The above-described actions of defendants constitute a breach of defendants' duty to avoid self-dealing.

7.4 As a proximate result of defendants' breach, the Corporation and plaintiff have been damaged in an amount to be proven at trial.

VIII  
FIFTH CLAIM  
Conflicting Interest Transactions

8.1 Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 through 7 above.

8.2 Defendants' above-described actions and conduct involve the commitment of the Corporation in transactions in which defendants, and/or related persons to defendants, have conflicting interest.



1           8.3     At the time the above-described transactions were consummated by the Corporation,  
2 defendants knew that defendants and/or related persons were parties to the transactions, or that the  
3 transactions had beneficial financial significance to defendants and/or related persons, and that their  
4 interests would reasonably be expected to exert an influence on defendants' judgment in voting in  
5 their capacities as directors.  
6

7           8.4     According to the circumstances at the time the above-described transactions took  
8 place, the transactions were not fair to the Corporation.

9           8.5     The above-described transactions were not approved by a majority of qualified  
10 directors or qualified shares as required by Idaho Code §§ 30-1-862 and 30-1-863, and are thereby  
11 ineffective.  
12

13          8.6     The above-described transactions constitute breach of defendants' obligations under  
14 Idaho Code §§ 30-1-860 through 30-1-863.

15          8.7     As a proximate result of defendants' engagement in conflicting interests transactions,  
16 the Corporation and plaintiff have been damaged in an amount to be proven at trial.  
17

18                 WHEREFORE, plaintiff requests the following relief, the amount of which is alleged to be  
19 within the jurisdictional limit, against defendants, jointly and severally as follows:  
20

21                 1.     For an award for all compensatory damages caused by or arising from the defendants'  
22 conduct;  
23

24                 2.     That a judgment be entered in favor of plaintiff in the amount to be proven at trial  
25 plus interest accruing with post judgment interest as allowed by law;  
26

**70**  
LAW OFFICES OF  
*Winston & Caskatt*  
250 NORTHWEST BLVD., SUITE 107A  
COEUR D'ALENE, IDAHO 83814  
(208) 867-2103  
FAX (208) 785-2121

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VERIFICATION

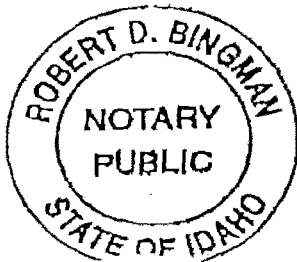
STATE OF IDAHO )  
 )ss.  
County of Nez Perce )

RONALD R. McCANN, being first duly sworn upon oath, deposes and says:

That he has read the above and foregoing Complaint for Damages for Recovery of Corporate Property, Breach of Fiduciary Duties, Negligence, Conversion, Self-Dealing, and Conflicting Interest Transactions, knows the contents thereof, and believes the same to be true.

*Ronald R. McCann*  
RONALD R. McCANN

SUBSCRIBED AND SWORN to before me this 27th day of June, 2000.



*Robert D. Bingham*  
Notary Public in and for the State of  
Idaho, residing at Clarkston, WA  
My appointment expires 2-1-02.

71

## LAST WILL AND TESTAMENT

OF

WILLIAM V. McCANN, SR.

COPY

I, WILLIAM V. McCANN, SR., a legal resident of Lewiston, Idaho, being of sound mind, do make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and codicils heretofore made by me.

Such revocation includes but is not limited to my Last Will and Testament executed on June 12, 1974, Codicil to my Last Will and Testament executed on December 3, 1974, my Last Will and Testament executed on October 29, 1985, First Codicil to my Last Will and Testament dated March 13, 1992, my Last Will and Testament executed on March 5, 1996.

## ARTICLE I.

I am married and my wife's name is ANNA G. McCANN. I hereby declare that on the date of execution of this Will I have the following children who are living:

WILLIAM VERN McCANN, JR., born [REDACTED] and

RONALD ROBERT McCANN, born [REDACTED]

Exhibit A

*Wm V McCann*

William V. McCann, Sr.

LAST WILL AND TESTAMENT - 1

That at the time of the execution of this Will, I have the following grandchildren:

MALINDA ANN McCANN, born [REDACTED] and

WILLIAM VERN McCANN, III, born [REDACTED]

I have at the time of signing this Last Will and Testament two (2) great grandchildren who are only provided for herein through their parent MALINDA ANN McCANN.

#### ARTICLE II.

Each reference in this will to the children, descendants, or issue of myself or of any other person is intended to refer to and include only the lawful children, descendants or issue of such persons as well as lawfully adopted children.

#### ARTICLE III.

It is my desire and intention under this my Will and Testament to dispose of all my separate property and my share of the community property owned by myself and my wife.

#### ARTICLE IV.

I direct that all of my just debts and my funeral expenses be paid as soon as practicable after my death. In the event that any property or interest in property passing under this will or by operation of law or otherwise by reason of my death shall be encumbered by a mortgage or a lien or shall be pledged to secure

William V. McCann

William V. McCann, Sr.

LAST WILL AND TESTAMENT - 2

any obligation, it is my intention that such indebtedness shall not be charged to or paid from my estate but that the devisee, legatee, joint owner or beneficiary shall take such property or interest in property subject to all encumbrances existing at the time of my death.

#### ARTICLE V.

I direct that all estate, inheritance, transfer, legacy, succession, and other death taxes and duties of any nature payable by reason of my death which may be assessed or imposed upon or with respect to property passing under this will or property not passing under this will shall be paid out of my estate as an expense of administration and no part of said taxes shall be apportioned or prorated to any legatee or devisee under this will or any person owning or receiving any property, including life insurance, not passing under this will.

#### ARTICLE VI.

I hereby bequeath and devise specifically as follows:

Should my wife, ANNA G. McCANN, survive me then

To GARY MEISNER as TRUSTEE of the WILLIAM V. McCANN, SR. STOCK TRUST as provided for in Article VIII herein my 66,600 shares of common stock of McCann Ranch & Livestock Co., Inc., an Idaho corporation, which is my sole and separate property.

To my son, WILLIAM V. McCANN, JR.:

  
\_\_\_\_\_  
William V. McCann, Sr.

LAST WILL AND TESTAMENT - 3

One leather-backed rocking chair with leather seat and elk carving;

All phonographs and cabinets for said phonographs;

All my sleigh bells and school bells; and

All my jewelry.

Should my wife ANNA G. McCANN predecease me then to WILLIAM V. McCANN, JR. my 66,600 shares of common stock of McCann Ranch & Livestock Co., Inc., an Idaho corporation, which is my sole and separate property.

~~To my son, RONALD ROBERT McCANN:~~

My guns and rifles; and

My player piano and all rolls for it.

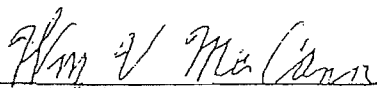
To LARRY KENNEDY, son of DARLENE McCANN, wife of my son, RONALD ROBERT McCANN:

The sum of One Dollar (\$1.00) only.

If any of the individual beneficiaries named in this article shall not survive me, then the bequest or devise to such individual shall lapse and shall become part of my residuary estate and disposed of according to the provisions hereinafter contained.

#### ARTICLE VII.

I bequeath to my wife, ANNA G. McCANN, if living at my death, all of my clothing, automobiles, and all other tangible personal property not otherwise specifically bequeathed, owned by me at the time of my death. If my said wife shall not survive me, I bequeath



William V. McCann, Sr.

LAST WILL AND TESTAMENT - 4

all of the aforesaid property in equal shares to my children who shall be living at the time of my death.

ARTICLE VIII.

I hereby create the WILLIAM V. McCANN, SR. STOCK TRUST the trustee of which shall be GARY MEISER and he shall receive 66,600 shares of common stock in the McCann Ranch & Livestock Co., Inc., an Idaho corporation, which is my sole and separate property.

Said WILLIAM V. McCANN, SR. STOCK TRUST shall be held, managed, controlled and distributed as follows:

A. Upon my death the Trustee shall hold, manage and control the property comprising the Trust estate, collect the income therefrom, and out of the same shall pay all taxes and other incidental expenses of the Trust, and shall hold or distribute the Trust estate and any income therefrom as provided hereinafter. The Trustee is empowered to sell to the Corporation whatever shares of stock are necessary to enable my estate to pay the estate and inheritance taxes due at the time of my death. The Trustee shall vote the stock and it is my intention that such Trustee shall vote the stock so as to create an income insofar as possible for my wife, ANNA G. McCANN.

  
William V. McCann, Sr.

LAST WILL AND TESTAMENT - 5




B. So long as the Trust continues, the Trustee shall pay to or apply for the benefit of my wife ANNA G. McCANN, so much of the income as Trustee in his discretion deems necessary for her support, care and maintenance. Any income not so distributed shall be accumulated and added to principal.

C. Upon the death of my wife, ANNA G. McCANN, the Trustee shall distribute the 66,600 shares of common stock plus any accumulated income to my son, WILLIAM V. McCANN, JR. It is my intention that if my son, WILLIAM V. McCANN, JR. survives myself and my wife that he shall be the sole owner of said 66,600 shares of common stock (or the remainder thereof) with all income therefrom to be his sole and separate property. In the event that my son shall predecease my wife, ANNA G. McCANN, then the stock shall be conveyed upon my death or the death of my wife, ANNA G. McCANN, should she survive me to GARY MEISNER as the TRUSTEE of the WILLIAM V. McCANN, SR. GRANDCHILDREN TRUST as provided for in Article X herein.

ARTICLE IX.

All the rest, residue and remainder of my estate, including all of my separate property, all of my own share of community property wheresoever situated (including property over which I have

  
William V. McCann, Sr.

LAST WILL AND TESTAMENT - 6

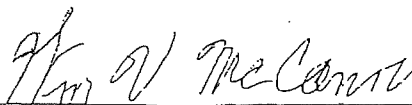
a power of appointment), and all lapsed legacies and devisees, I bequeath and devise to my wife, ANNA G. MCCANN, if she survives me. In the event my wife predeceases me, then I bequeath and devise said remainder to GARY MEISER the Trustee for the WILLIAM V. MCCANN, SR. GRANDCHILDREN TRUST.

ARTICLE X.

Said WILLIAM V. MCCANN, SR. GRANDCHILDREN TRUST shall be held, managed, controlled and distributed as follows:

A. Upon my death the Trustee shall hold, manage and control the property comprising the Trust estate, collect the income therefrom, and out of the same shall pay all taxes and other incidental expenses of the Trust, and shall hold or distribute the Trust estate and any income therefrom as provided hereinafter. The Trustee is empowered to sell to the Corporation whatever shares of stock are necessary to enable my estate to pay the estate and inheritance taxes due at the time of my death.

B. So long as the Trust continues, the Trustee shall pay to or apply for the benefit of my grandchildren so much of the income and principal of the Trust as the Trustee in his discretion deems necessary for their support, care, maintenance and education (including college and postgraduate

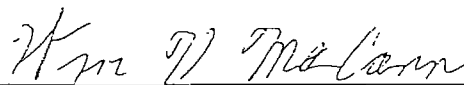


William V. McCann, Sr.

LAST WILL AND TESTAMENT - 7

study, so long as pursued to advantage by the beneficiary), after taking into consideration to the extent the Trustee deems advisable their independent income and other resources known to the Trustee (including the capacity for gainful employment of any beneficiary who has completed or is not pursuing his or her education). Any income not so distributed shall be accumulated and added to principal. In making these payments, the Trustee may pay more to or apply more for some ~~beneficiaries than others,~~ and distributions may be made to one or more beneficiaries to the exclusion of others, if the Trustee deems this necessary in light of the circumstances, the size of the Trust estate and the probable future needs of the beneficiaries. In addition, the Trustee may, if he deems it advisable, apply income and principal of the Trust for the support of the guardian of the beneficiaries to the extent that such enhances the quality of care of my grandchildren without endangering the fulfillment of the key objective of this Trust which is to provide for the care and education of my grandchildren.

C. After my youngest grandchild reaches the age of thirty-five (35) years, the Trustee shall make distributions of the net income of the Trust annually (commencing with the calendar year said birthday occurs) and the final distribution

  
\_\_\_\_\_  
William V. McCann, Sr.

LAST WILL AND TESTAMENT - 8

of the Trust corpus shall be made when my youngest grandchild reaches the age of forty-five (45) years.

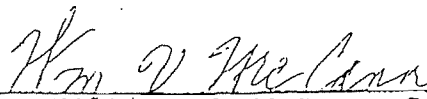
D. In the event any beneficiary should predecease me or predecease the termination of this Trust leaving issue surviving him or her, said beneficiary's share shall pass to said beneficiary's children who survive him or her, in equal shares.

E. In the event any beneficiary should predecease me or predecease the termination of this Trust leaving no issue surviving him or her, said beneficiary's share shall pass to those beneficiaries who survive me, in equal shares.

F. Should all the beneficiaries of the Trust predecease the termination of the Trust, then the Trustee shall distribute any remaining Trust estate to my children who have not predeceased the termination of the Trust.

G. All receipts and expenditures shall be administered by the Trustee, subject to any limitations stated elsewhere herein and allocated as to principal and income as provided in the Uniform Principal and Income Act, being Chapter 10 of Title 68, Idaho Code, as now in effect and as it may hereafter be amended.

H. To carry out the purposes of the Trust created herein, and subject to any limitations stated elsewhere

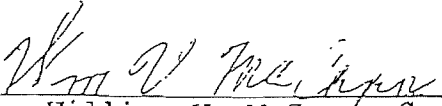


William V. McCann, Sr.

LAST WILL AND TESTAMENT - 9

herein, the Trustee is vested with all of the powers and authority as set forth in the Uniform Trustee's Powers Act, being Chapter 1 of Title 68, Idaho Code, as now in effect and as it may hereafter be amended.

The Trustee shall manage the Trust estate and may sell, exchange, lease for terms either within or beyond the duration of the Trust, lend, relend, invest and re-invest the Trust estate or any part thereof in any kind of property which men  
~~of prudence, discretion, and intelligence~~ exercise for their own account, specifically including, but not by way of limitation, acquisition of corporate obligations of every kind and preferred and common stocks. The Trustee shall have the same general powers that an individual being the absolute owner of real and personal property possesses not inconsistent with the purposes and intentions of the Trust. The Trustee is authorized to retain in the Trust, in the same form as that in which they were received by the Trustee, assets of any kind, and to continue and operate any business or interest therein which may be received hereunder as long as the same produces a reasonable income, and it appears to the best interest and advantage of the Trust estate.

  
\_\_\_\_\_  
William V. McCann, Sr.

LAST WILL AND TESTAMENT - 10

I. In no event is said Trust to last longer than the period required pursuant to Section 55-111, Idaho Code, governing suspension of power of alienation.

ARTICLE XI.

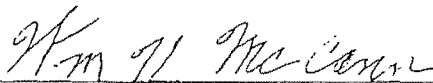
Should GARY MEISNER at any time be unable or unwilling to act as the Trustee of either or both the Trust(s), I hereby appoint CUMER L. GREEN as the Trustee of said Trust(s). If CUMER L. GREEN is unable or unwilling to act as such Trustee, I request that a Trustee be appointed by a court of competent jurisdiction.

ARTICLE XII.

If my wife and I, any other beneficiaries and I, or any primary and secondary beneficiary, die simultaneously or under such conditions that it cannot be determined from credible evidence which of us survived, the provisions made herein for my wife shall be construed as though she had survived me and my estate shall be distributed accordingly; any other person interested under this Will shall be deemed to have predeceased me; and, any secondary beneficiary shall be deemed to have predeceased the primary beneficiary.

ARTICLE XIII.

If any legatee, devisee, or taker under this Will shall interpose objections to its probate or in any other way contest it,



William V. McCann, Sr.

LAST WILL AND TESTAMENT - 11

such person shall forfeit his or her entire interest under this Will and the gift, bequest or devise made to such person shall pass as part of the residue of my estate; provided, however, that if such person is a residuary beneficiary, his or her interest shall be divided proportionately among the remaining residuary beneficiaries.


#### ARTICLE XIV.

I request that my Personal Representative employ WILLIAM V. MCCANN, JR., as attorney, not only in connection with the probate of my Will, but also in connection with any and all other matters of a legal nature relating to the administration of the estate. In the event WILLIAM V. MCCANN, JR. is unable or unwilling to act as attorney, then I request that the Personal Representative employ CUMER L. GREEN, Boise, Idaho as such attorney.

#### ARTICLE XV.

I hereby appoint my wife, ANNA G. MCCANN, to be the Personal Representative of this, my Last Will and Testament, and I direct that as such Personal Representative she not be required to execute a bond for the faithful performance of her duties.

In the event my wife shall predecease me, or shall fail for any reason to qualify as my Personal Representative, then in that event, I appoint my son, WILLIAM V. MCCANN, JR., of Lewiston, Idaho

  
William V. McCann, Sr.

LAST WILL AND TESTAMENT - 12

as sole Personal Representative, to serve in such capacity without bond.

IN WITNESS WHEREOF, I subscribe my name this 16<sup>th</sup> day of

May, 1996.

Wm V McCann  
WILLIAM V. McCANN, SR.

~~The foregoing instrument, consisting of fourteen (14) pages,~~  
including the following page, was, on the date hereof, signed,  
published and declared by the above named Testator to be his Last  
Will and Testament, in the presence of us, who at his request and  
in his presence and in the presence of each other, and on the same  
date, have subscribed our names as witnesses thereto.

[Signature] residing at Boise, Idaho  
Grinda Fall residing at Moscow, Idaho

Wm V McCann  
William V. McCann, Sr.

LAST WILL AND TESTAMENT - 13



STATE OF IDAHO )  
 ) ss.  
 County of Nez Perce )

We, WILLIAM V. McCANN SR., and Cumer, Green and LINDA FALL, the Testator and witnesses, respectively, whose names are subscribed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the Testator signed and executed said instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the Testator, signed the will as witness and to the best of his knowledge the Testator was at that time an adult, of sound mind and under no constraint or undue influence.

Wm V McCann

WILLIAM V. McCANN SR., Testator

[Signature]

Witness

Linda Fall

Witness

SUBSCRIBED, SWORN to and acknowledged before me by WILLIAM V. McCANN SR., the Testator, and subscribed and sworn to before me by Cumer, Green and LINDA FALL, witnesses, this 6th day of May, 1996.

Chantell D. Hirsinger

Notary Public for Idaho

Residing at Lewiston

My commission expires 10-8-98

Wm V McCann

William V. McCann, Sr.

LAST WILL AND TESTAMENT - 14

# Winston & Cashatt

## LAWYERS

### A PROFESSIONAL SERVICE CORPORATION

C. Matthew Andersen \*  
 Beverly L. Anderson  
 Meris Ballins  
 Robert P. Beschel  
 Richard L. Cress  
 Bonnie L. Charney \*  
 Robert H. Crick  
 Patrick J. Cronin \*  
 Kevin J. Curtis \*  
 Stephen L. Farnell  
 John H. Gulin \*  
 Matthew E. Harget \*  
 Tim M. Higgins  
 Eric C. Hoort  
 Carl E. Huber  
 Brian T. McGinn \*  
 Stanley D. Moore \*  
 Tamara W. Murock \*  
 Fred C. Pflanz  
 Lynden O. Rasmussen

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James E. Reed  
 Richard W. Relyea  
 Patrick A. Sullivan  
 Lawrence H. Vance, Jr.  
 Lucinda S. Whaley  
 Melwether D. Williams

Of Counsel  
 Michael J. Cronin

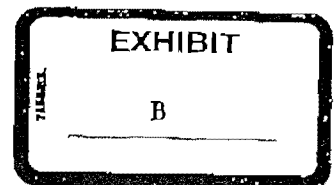
Leo N. Cashatt (1910 - 1977)  
 Joseph J. Rekofer (1921 - 1999)  
 Patrick H. Winston (1904 - 1999)

All members admitted in Washington  
 \* Additionally admitted in Idaho  
 \* Additionally admitted in California  
 \* Additionally admitted in Montana

Website: [www.winstoncashatt.com](http://www.winstoncashatt.com)  
 E-Mail: [lawyers@winstoncashatt.com](mailto:lawyers@winstoncashatt.com)

December 6, 1999

Mr. Cumer L. Green  
 Green Law Offices  
 P. O. Box 2597  
 1505 Tyrell Lane  
 Boise, ID 83701-2597



Re: McCann Ranch & Livestock Company, Inc.

Dear Mr. Green:

I have preliminarily reviewed the materials supplied by you regarding the McCann corporation and hereby identify certain problems which when resolved would do much to foster the spirit of cooperation to divide the assets of the corporation as we discussed in our last meeting.

The concerns raised in your letter of November 18, 1999 were timely. I too have noticed and identified certain problems regarding the use of corporate assets and the payment of corporate property which, while so often practiced in the context of closely held corporations, must be avoided if we are to regard the corporation as a separate legal entity with primary allegiance to all its shareholders.

I have already raised this concern by suggesting that Mr. Ron McCann be paid a salary equal to his brother for the service he contributes to the welfare of the corporation. This idea was not accepted. We therefore must ask that all amounts paid to or for the benefit of all family members be done in the context of legitimate compensation or as a distribution on shares.

A review of the tax returns over the last several years reveals that salaries were paid to certain individuals which should be treated as distributions on shares as opposed to legitimate salaries.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

86

Cunier L. Green  
December 6, 1999  
Page 2

A review of the Will of William V. McCann, Sr. reveals that he specifically provided that an income be created for Mrs. McCann from the trust left in his Will. The Will also provides that the Trustee is to sell (redeem) to the corporation shares of stock to enable the estate to pay the estate and inheritance taxes.

It appears that neither of these instructions of Mr. McCann, Sr. have been carried out.

The estate and Mrs. McCann are indebted to the corporation to the extent of \$256,000.00 and \$81,000.00 respectively. Instead of creating an income stream for Mrs. McCann through the appropriate means of redemption of shares, an improper and unsupportable consulting fee has been created which would result in substantial problems to the corporation if the income tax returns were audited by the Internal Revenue Service.

These are *ultra vires* acts which are improper under state and federal law and are counter to Mr. McCann, Sr.'s directions in his Will.

We are in the process of reviewing all of the properties and will make our selection of the desired properties known to you for the corporate division.

In the meantime, it is Mr. Ron McCann's request that the above mentioned problems be corrected so that the proper equity ownership of the corporation is reflected in the books and records.

As to the concerns raised in your letter of November 18, 1999, a more accurate recital of the facts may be that all family members, including Mr. William V. McCann, Jr.'s children, have repeatedly used corporate assets and in fact have had accidents with such assets that have resulted in substantial damage and detriment to the corporation. As we have discussed before, it probably would be best to concentrate on what we can do to correct the relationship between the brothers in the future as opposed to revisiting past perceived wrongs.

Thank you for your consideration of these matters.

Very truly yours,

MARIS BALTINS

MXB:stt

# Winston & Cashatt

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A PROFESSIONAL SERVICE CORPORATION

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January 21, 2000

### Facsimile Transmittal / U.S. Mail

Cumer L. Green  
 Green Law Offices  
 P.O. Box 2597  
 1505 Tyrell Lane  
 Boise, ID 83701-2597

Re: McCann Ranch & Livestock Co.

Dear Mr. Green:

I was very disappointed to learn that Mr. Bill McCann has given direction to start logging the Forest Ranch after our discussion that such action is not legally required and after Mr. Ron McCann's repeated requests to cease logging on the property which he may wish to take into his corporation after the corporate split up.

In your January 12, 2000 letter it appears that Mr. Bill McCann is purposely using logging as a club to force Mr. Ron McCann into a premature settlement offer while Mr. Ron McCann does not have sufficient information to make an informed decision.

As you are aware, the total fair market value of McCann Ranch and livestock is likely to be in the fifteen million dollar (\$15,000,000.00) range and contains over eighteen (18) separate commercial and ranch properties.

Each of these properties must be investigated and reviewed so that Mr. Ron McCann makes a fully informed decision.

It is patently unfair to force Mr. Ron McCann into a quick decision when his brother has had the benefit of being involved in all details of the properties for at least the last fifteen (15) years.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Cumer L. Green  
January 21, 2000  
Page 2

I appreciate your consent to allow Mr. Ron McCann's accountant and appraiser to have full access to all of the corporate books and records. Mr. Ron McCann's accountant will come to the corporate office on January 25, 2000 at 9:00 a.m.

In order to get this matter back on track toward resolution it is my request that you ask Mr. Bill McCann to get the loggers to cease their activities.

We will proceed in a reasonable manner to complete our investigation and present our offer for the split up as soon as such investigation is complete.

As we have discussed before, if we all act in good faith we should be able to accomplish a settlement of this matter.

Thank you for your consideration of this matter.

Very truly yours,

MARIS BALINS

MXB:stt

# Winston & Cashatt

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All members admitted in Washington  
\* Additionally admitted in Idaho  
\* Additionally admitted in California  
\* Additionally admitted in Montana

June 9, 2000

## Facsimile Transmission & US Mail

Mr. Cumer L. Green  
Green Law Offices  
P. O. Box 2597  
1505 Tyrell Lane  
Boise, ID 83701-2597

Re: McCann Ranch & Livestock Co.

Dear Mr. Green:

Since December 1999, we have patiently waited for the corporation to take action to remedy those issues we have outlined as being serious violations of law and otherwise not in the best interests of the corporation. Despite our repeated attempts, however, the corporation has engaged in numerous tactics to delay the resolution of these matters.

As a result, this letter, in addition to those provided to you on behalf of the corporation on December 6, 1999 and January 21, 2000, serves as written demand pursuant to Idaho Code § 30-1-742 by Ron McCann upon the corporation to take suitable action to remedy the following illegal or improper acts of the corporation:

1. The loan in excess of \$337,000.00 made to the estate of Mr. William McCann, Sr. and Mrs. Gertrude McCann is an improper business use of corporate assets, and in light of the direction in Mr. William McCann, Sr.'s Will, the corporation shall seek the return of such funds, and redeem the company shares of the estate and Mrs. McCann.
  2. Payments made to or on behalf of Mrs. Gertrude McCann as compensation or consulting fees are inappropriate whereas Mrs. Gertrude McCann provides no services to the corporation, and in light of Mr. William McCann, Sr.'s Will that shares be redeemed to
- MEMORANDUM IN SUPPORT OF MOTION TO DISMISS 90

Mr. Cumer L. Green  
June 9, 2000  
Page 2

provide an income stream to Mrs. McCann, the corporation shall seek reimbursement of such improper compensation, and redeem the shares of Mrs. McCann.

3. Payments by McCann Ranch & Livestock Co. for monthly inspection services by DBS have been inappropriately reflected on a Form 1099 as opposed to a W-2. In 1999, the Form 1099 reflects miscellaneous payments of \$19,476.00 to DBS. In 1998, the Form 1099 reflects payments of \$34,908.00 to DBS. The company checks were endorsed "DBS - Bill Skelton." Mr. Skelton was listed as the immediate supervisor of corporate employee Matt Albright in a Department of Labor Claim - Employer Separation Statement. The statement was signed by Matt Albright and Bill McCann, Jr. The corporation shall properly list Mr. Skelton as an employee, issue Forms W-2 to Mr. Skelton, and take immediate actions to pay the employment taxes associated with Mr. Skelton's employment.
4. Employees of McCann Ranch & Livestock Co. are being paid by the company to do work other than company work. Examples pertaining to this issue include:
  - a. Larry Watkins working at Garden City Apartments for 30 hours on one time card and 25 hours on another;
  - b. Matt Albright doing sewer work at 704 Castle Street which is owned by Lori McCann, for 43 hours on 8-12-99; and
  - c. Joe Heing doing sewer work at 704 Castle Street on company time.

The corporation shall immediately cease paying corporate employees for the performance of noncorporate work, and seek reimbursement for such payments from those individuals or entities who benefited from such use of corporate employees.

5. Company expenditures in 1999 at B&B Auto Brite were inappropriate corporate expenditures. Examples of this issue include:
  - a. Expenditures totaling \$234.35 made by William V. McCann, Jr. for his Mercedes;
  - b. Expenditures totaling \$181.30 made by Chantell Hoisington for her personal vehicle;
  - c. Expenditures totaling \$80.65 made by Gertrude McCann for her personal vehicles;
  - d. Expenditures totaling \$12.95 made by Jason Beck for his personal vehicle;
  - e. Expenditures totaling \$24.94 made by Aaron Beck for his personal vehicle;
  - f. Expenditures totaling \$12.95 made by Bill Skelton; and

Mr. Cumer L. Green  
June 9, 2000  
Page 3

- g. Expenditures totaling \$69.95 made by William V. McCann, III.

The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such payments from those individuals or entities who benefited therefrom.

6. Company expenditures at Brunnel Tire and Auto Service Center were inappropriate corporate expenditures. Examples of this issue include:
- a. Expenditures totaling \$256.15 made by Howard Hoffman for his personal pickup;
  - b. Expenditures totaling \$707.03 made by Gertrude McCann for her Honda, Mercedes and truck;
  - c. Expenditures totaling \$23.05 made by William V. McCann, Jr. for his personal vehicle;
  - d. Expenditures totaling \$459.46 made by William V. McCann III for a Mazda pickup;
  - e. Expenditures totaling \$291.61 made by William V. McCann, Jr.'s stepson's vehicle;
  - f. Expenditures totaling \$303.13 for a 1989 Ford Escort, license number 1L50910; and
  - g. Expenditures totaling \$220.70 for a Toyota 4x4, license number N46992 owned by Casey and Company.

The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.

7. Company expenditures at Forest Auto Wrecking were inappropriate corporate expenditures. Examples of this issue include:
- a. Expenditures totaling \$417.50 for a Ford Escort engine and miscellaneous Probe parts;
  - b. Expenditures totaling \$16.90 for a Mazda B2200 tailgate handle assembly;
  - c. Expenditures totaling \$367.50 for a 1990 Toyota pickup transmission;
  - d. Expenditures totaling \$52.50 for a pickup alternator;



Mr. Cumer L. Green  
June 9, 2000  
Page 4

- e. Expenditures totaling \$78.75 for a 1984 Plymouth minivan quarter window; and
- f. Expenditures totaling \$131.25 for a Ford van rear bumper.

The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.

- 8. Company expenditures at Schrader's Truck and Auto Repair were inappropriate corporate expenditures. Examples of this issue include:
  - a. Expenditures totaling \$260.54 for a 1991 Toyota 4x4;
  - b. Expenditures totaling \$260.54 for a Mazda pickup;
  - c. Expenditures totaling \$79.10 for a Ford van; and
  - d. Expenditures totaling \$379.49 for a 1990 Ford pickup.

The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.

- 9. A corporate expenditure of \$120.00 at Master's Body Shop for work on a 1998 Chevy, license number N5332T was an inappropriate corporate expenditure. The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.
- 10. A corporate expenditure of \$92.40 at Auto Trim and Design for work on a 1998 Chevy, license number N5332T was an inappropriate corporate expenditure. The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.
- 11. A corporate expenditure of \$198.52 by William V. McCann III at Bann & Bann Auto Service was an inappropriate corporate expenditure. The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.
- 12. The black stock truck owned by the company is being used for personal storage for William McCann, Jr. and thereby causing the company to incur additional expenses by hiring out the hauling of company livestock. The corporation shall immediately cease the use of corporate property for noncorporate use, and seek reimbursement for such use

Mr. Cumer L. Green  
June 9, 2000  
Page 5

13. The corporation has entered into various logging contracts for the logging of timber on corporate property, and such logging is substantially depleting the value of the property. The corporation shall immediately cease all logging of timber on corporate property.

In the event no corrective action is taken within the next ten day, and since you have ignored our earlier demands made on December 6, 1999 and January 21, 2000, an action against the following individuals and entities will be commenced with no further notice to you:

1. Mr. William V. McCann, Jr., as an officer, director and shareholder of McCann Ranch & Livestock Co.;
2. McCann Ranch & Livestock Co., an Idaho corporation; and
3. Gary E. Meisner, as Trustee of the William V. McCann, Sr. Stock Trust, and as a director and shareholder of McCann Ranch & Livestock Co.

Attached for your review is a draft Complaint for Damages for Recovery of Corporate Property, Breach of Fiduciary Duties, Negligence, Conversion, Self-Dealing, and Conflicting Interest Transactions which shall be filed in the event the corporation does not undertake the above demanded actions.

As we have previously discussed on numerous occasions, many of the above demanded issues may subject the corporation, its directors and its officers to substantial penalties imposed by the Internal Revenue Service. For this reason, we request that immediate attention be given to this demand, and that the above demanded actions be undertaken. We simply cannot allow you to postpone action on these demands another 60 days that without risk to the Corporation and Mr. Ron McCann in his position as a director of the corporation.

Thank you for your consideration.

Very truly yours,



MARIS BALTINS  
TAMARA W. MUROCK

cc: Ron McCann  
Bob Myers  
Gary E. Meisner  
Larry J. Durkin

# EXHIBIT 2

TAMARA W. MUROCK  
WINSTON & CASHATT  
250 Northwest Boulevard  
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Coeur d'Alene, Idaho 83814  
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MARIS BALTINS  
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601 W. Riverside, Suite 1900  
Spokane, Washington 99201-0695  
Telephone: (509) 838-6131  
Attorneys for Plaintiff

DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

RONALD R. McCANN, individually and  
as a shareholder of McCANN RANCH &  
LIVESTOCK CO.,

Plaintiff,

vs.

WILLIAM V. McCANN, JR., as an  
officer, director and shareholder of  
McCANN RANCH & LIVESTOCK CO.,  
GARY E. MEISNER, Trustee of  
the WILLIAM V. McCANN, SR.  
STOCK TRUST, and as a director and  
shareholder of McCANN RANCH &  
LIVESTOCK CO., and McCANN  
RANCH & LIVESTOCK, CO., an Idaho  
Corporation,

Defendants.

No. CV 00-01111

AMENDED COMPLAINT  
FOR DAMAGES FOR RECOVERY  
OF CORPORATE PROPERTY,  
BREACH OF FIDUCIARY DUTIES,  
NEGLIGENCE, CONVERSION, SELF-  
DEALING, AND CONFLICTING  
INTEREST TRANSACTIONS

Plaintiff complains of defendants and alleges as follows:

I  
JURISDICTION AND VENUE

1.1 The causes of action arise in Nez Perce County, Idaho, in that all the acts and transactions constituting alleged breaches involve directors, shareholders, and officers of McCann Ranch & Livestock Co., an Idaho corporation doing business in Nez Perce County, Idaho.

1.2 This action is not collusive one to confer jurisdiction on a court of the state of Idaho which it would not otherwise have.

II  
PARTIES

2.1 Plaintiff is an individual residing in Nez Perce County, Idaho, and was a 36.7% shareholder of McCann Ranch & Livestock Co. at the time of the transactions of which plaintiff herein complains. This action is brought by plaintiff individually and as a derivative action pursuant to Idaho Code §§ 30-1-740 through 30-1-746. Plaintiff fairly and adequately represents the interests of the shareholders or members similarly situated in enforcing the right of defendant McCann Ranch & Livestock Co.

2.2 Plaintiff is informed and believes, and thereon alleges, that defendant William V. McCann, Jr. is an individual residing in Nez Perce County, Idaho, a director, officer and a 36.7% shareholder of McCann Ranch & Livestock Co.

2.3 Plaintiff is informed and believes, and thereon alleges, that defendant Gary E. Meisner, is the Trustee of the William V. McCann, Sr. Stock Trust, and a director of the McCann Ranch & Livestock Co. The William V. McCann, Sr. Stock Trust is a 26.6% shareholder of McCann Ranch & Livestock Co.



1 (d) To pay and apply the trust income for the benefit of Mrs. McCann; and

2 (e) To distribute the Corporation's stock plus any accumulated income to  
3 defendant William McCann, Jr. upon the death of Mrs. McCann.

4 3.6 Plaintiff is informed and believes, and thereon alleges, that at the time of Mr.  
5 McCann, Sr.'s death, the estate owed United States Estate Tax in the amount of \$167,384, and Idaho  
6 Estate Tax in the amount of \$32,994. Contrary to the terms of the Will, the funds to pay the taxes  
7 were not obtained from a redemption of the Trust's stock.

8 3.7 In an effort to prevent a depletion of defendant William McCann, Jr.'s future stock  
9 ownership, the defendants, in their positions as directors, shareholders and an officer, improperly  
10 caused the Corporation to loan in excess of \$337,000 to the estate for the payment of estate and  
11 inheritance taxes.

12 3.8 The defendants' conduct in causing the Corporation to loan in excess of \$337,000 to  
13 the estate for the payment of estate and inheritance taxes is a violation of the terms of the Will, and is  
14 not in the best interests of the Corporation and/or plaintiff.

15 3.9 Plaintiff is informed and believes, and thereon alleges, that throughout the term of the  
16 Trust's administration, the Trust's primary beneficiary, Mrs. McCann, has required the use of trust  
17 income. Contrary to the terms of the Will, this income was not obtained from the trustee's vote of  
18 the corporate stock so as to create an income insofar as possible for Mrs. McCann.

19 3.10 In an effort to prevent a depletion of defendant William McCann, Jr.'s future stock  
20 ownership, the defendants, in their positions as directors, shareholders and an officer, improperly  
21 caused the Corporation to loan \$81,000 to Mrs. McCann in the form of an Officer's Account  
22

1 Receivable, and to pay a wage to Mrs. McCann under the guise of a consulting fee in the amount of  
2 \$48,000 per year.

3 3.11 The defendants' conduct in causing the Corporation to loan \$81,000 and pay a wage  
4 of \$48,000 per year to Mrs. McCann is a violation of the terms of the Will, and is not in the best  
5 interests of the Corporation and/or plaintiff.  
6

7 3.12 Plaintiff is informed and believes, and thereon alleges, that defendants have  
8 improperly caused the expenditure of substantial corporate funds for the purchase of vehicles,  
9 insurance, homes, and other gifts for defendant William McCann, Jr., his family and his friends,  
10 including but not limited to:  
11

12 (a) Corporate expenditures at B&B Auto Brite including but not limited to:

13 (i) Expenditures totaling \$234.35 made by defendant William McCann,  
14 Jr. for his Mercedes;

15 (ii) Expenditures totaling \$181.30 made by Chantell Hoisington for her  
16 personal vehicle;

17 (iii) Expenditures totaling \$80.65 made by Gertrude McCann for her  
18 personal vehicles;

19 (iv) Expenditures totaling \$12.95 made by Jason Beck for his personal  
20 vehicle;

21 (v) Expenditures totaling \$24.94 made by Aaron Beck for his personal  
22 vehicle;

23 (vi) Expenditures totaling \$12.95 made by Bill Skelton; and  
24

25 (vii) Expenditures totaling \$69.95 made by William V. McCann, III.  
26

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

LAW OFFICES OF

Winston & Cashatt  
100  
107A



1 (b) Corporate expenditures at Brunnel Tire and Auto Service Center including but  
2 not limited to:

3 (i) Expenditures totaling \$256.15 made by Howard Hoffman for his  
4 personal vehicle;

5 (ii) Expenditures totaling \$707.03 made by Gertrude McCann for her  
6 Honda, Mercedes and truck;

7 (iii) Expenditures totaling \$23.05 made by defendant William McCann, Jr.  
8 for his personal vehicle;

9 (iv) Expenditures totaling \$459.46 made by William V. McCann III for a  
10 Mazda truck;

11 (v) Expenditures totaling \$291.61 made by defendant William McCann,  
12 Jr.'s stepson's vehicle;

13 (vi) Expenditures totaling \$303.13 for a 1989 Ford Escort, license number  
14 1L50910; and

15 (vii) Expenditures totaling \$220.70 for a Toyota 4x4, license number  
16 N46992 owned by Casey and Company.

17 (c) Corporate expenditures at Forest Auto Wrecking including but not limited to:

18 (i) Expenditures totaling \$417.50 for a Ford Escort engine and  
19 miscellaneous Probe parts;

20 (ii) Expenditures totaling \$16.90 for a Mazda B2200 tailgate handle  
21 assembly;

22 (iii) Expenditures totaling \$367.50 for a 1990 Toyota truck transmission;

23 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

1 (iv) Expenditures totaling \$52.50 for a truck alternator;

2 (v) Expenditures totaling \$78.75 for a 1984 Plymouth minivan quarter  
3 window; and

4 (vi) Expenditures totaling \$131.25 for a Ford van rear bumper.

5 (d) Corporate expenditures at Schrader's Truck and Auto Repair including but not  
6 limited to:

7 (i) Expenditures totaling \$260.54 for a 1991 Toyota 4x4;

8 (ii) Expenditures totaling \$260.54 for a Mazda truck;

9 (iii) Expenditures totaling \$79.10 for a Ford van; and

10 (iv) Expenditures totaling \$379.49 for a 1990 Ford truck.

11 (e) Corporate expenditures at Master's Body Shop including but not limited to an  
12 expenditure in the amount of \$120.00 for work on a 1998 Chevy, license number N5332T.

13 (f) Corporate expenditures at Auto Trim and Design including but not limited to  
14 an expenditure in the amount of \$92.40 for work on a 1998 Chevy, license number N5332T.

15 (g) Corporate expenditures at Bann & Bann Auto Service including but not  
16 limited to an expenditure by William V. McCann III in an the amount of \$198.52.

17 3.13 Plaintiff is informed and believes, and thereon alleges, that defendants have  
18 improperly caused the expenditure of substantial corporate funds for the payment of compensation  
19 and other benefits to defendant William McCann, Jr., his family, and his friends of which were not  
20 properly payable.  
21  
22  
23  
24  
25  
26

1           3.14 Plaintiff is informed and believes, and thereon alleges, that defendants have caused  
2 the use and payment of corporate employees for the performance of work other than company work,  
3 including but not limited to:

4           (a) Payment of corporate employee, Larry Watkins, for work performed at the  
5 Garden City Apartments for 30 hours on one time card and 25 hours on another;

6           (b) Payment of corporate employee, Matt Albright, for performing sewer work at  
7 704 Castle Street which is owned by Lori McCann, for 43 hours on or about August 12,  
8 1999; and

9           (c) Payment of corporate employee, Joe Heing, for performing sewer work at 704  
10 Castle Street on company time.

11           3.15 Plaintiff is informed and believes, and thereon alleges, that defendants have  
12 improperly caused the use of corporate property for the personal benefit of defendant William  
13 McCann, Jr., his family and his friends, including but not limited to the use of the Corporation's  
14 black stock truck by defendant for personal storage, and thereby causing the Corporation to incur  
15 additional expenses by hiring out the hauling of company livestock.

16           3.16 Plaintiff is informed and believes, and thereon alleges, that defendants, in their  
17 capacity as directors, shareholders and an officer of the Corporation, entered into various  
18 transactions improperly benefiting defendant William McCann, Jr., his family, and his friends.

19           3.17 Plaintiff is informed and believes, and thereon alleges, that defendants caused the  
20 Corporation to enter into various logging contracts for the logging of timber on corporate property,  
21 and that such logging is substantially depleting the value of the property. Despite plaintiff's repeated  
22

1 protests, and defendants' assurances ~~that~~ the logging would be suspended, defendants have caused  
2 the logging to continue to the detriment of the Corporation and plaintiff.

3 3.18 Plaintiff is informed and believes, and thereon alleges, that defendants caused  
4 corporate payments for ~~monthly inspection~~ services by DBS to be improperly reflected on a 1999  
5 Form 1099 as miscellaneous payments in the amount of \$19,476.00, and on a 1998 Form 1099 as  
6 miscellaneous payments in the amount of \$34,908.00. The corporate checks in payment for such  
7 services were endorsed "DBS - Bill Skelton," and Mr. Skelton has been identified as a supervisor at  
8 the Corporation. As such, Mr. Skelton is an employee of the corporation, and the corporation should  
9 have reported his compensation on a Form W-2, and paid the applicable employment taxes in respect  
10 to such compensation.  
11

12  
13 3.19 The defendants' above-described actions and conduct were undertaken for the  
14 personal benefit of defendant William McCann, Jr., his family and his friends, and are not in the best  
15 interests of the Corporation and/or plaintiff.  
16

17 3.20 The plaintiff made numerous efforts to prevent the Corporation's continued  
18 engagement in the above-described improper and illegal conduct, including but not limited to, oral  
19 and written demands, including those written demands of December 6, 1999, January 21, 2000 and  
20 June 9, 2000, by plaintiff's counsel upon the Corporation by and through the Corporation's attorney,  
21 Cumer L. Green. A true and correct copy of the written demands are attached hereto as Exhibit "B."  
22 Plaintiff's demands required the Corporation to:

- 23  
24 (a) Seek the return of the loan in excess of \$337,000 made to the estate of  
25 William McCann, Sr., and redeem the company shares of the estate and Gertrude McCann,  
26 all as set forth in the attached Exhibit B;

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

1 (b) Seek reimbursement of the improper compensation or consulting fees to  
2 Gertrude McCann and redeem the shares of Gertrude McCann, all as set forth in the attached  
3 Exhibit B;

4  
5 (c) Properly list the Corporation's employee, Mr. Skelton, as an employee, issue  
6 Forms W-2 to Mr. Skelton, and take immediate actions to pay the employment taxes  
7 associated with Mr. Skelton's employment, all as set forth in the attached Exhibit B;

8 (d) Immediately cease paying corporate employees for the performance of  
9 noncorporate work, and seek reimbursement for such payments from those individuals or  
10 entities who benefited from such use of corporate employees, all as set forth in the attached  
11 Exhibit B;

12  
13 (e) Immediately cease expending corporate funds for noncorporate goods and  
14 services, and seek reimbursement for such payments from those individuals or entities who  
15 benefited therefrom, all as set forth in the attached Exhibit B;

16  
17 (f) Immediately cease the use of corporate property for noncorporate use, and  
18 seek reimbursement for such use from those individuals or entities who benefited therefrom,  
19 all as set forth in the attached Exhibit B; and

20 (g) Immediately cease all logging of timber on corporate property, all as set forth  
21 in the attached Exhibit B.

22 3.21 Despite plaintiff's repeated demands, defendants refused plaintiff's demands, by  
23 continuing to engage in the above-described actions and conduct, and otherwise rejecting plaintiff's  
24 demands, including but not limited to refusing to take immediate action demanded by plaintiff, by  
25  
26

1 taking action contrary to plaintiff's demands, and by unreasonably postponing board of directors'  
2 meetings in order to prevent the Corporation from complying with plaintiff's demands.

3 3.2 Irreparable injury to the Corporation would result in postponing plaintiff's  
4 commencement of this action. Such injury includes but is not limited to the imposition of substantial  
5 fines, penalties, and criminal charges upon the Corporation, its directors and its officers, and the  
6 continuation of the Corporation's extensive logging of corporate property and the resulting depletion  
7 in the property's value.  
8

9 3.3 A demand upon the Corporation to remedy the above-described acts of misconduct of  
10 which plaintiff complains is futile in that the defendants are directors of the Corporation and the  
11 cause of the Corporation's engagement in such misconduct, and despite plaintiff's repeated oral and  
12 written demands since the summer of 1999, the Corporation has taken no action to comply with  
13 plaintiff's demands.  
14

15 3.4 As described above, the board of directors acted in bad faith for failing and/or refusing  
16 to comply with plaintiff's demands.  
17

18 IV

19 FIRST CLAIM

20 Breach of Fiduciary Duties

21 4.1. Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
22 through 3 above.

23 4.2 As shareholders, directors, and an officer of the Corporation, defendants owe the  
24 Corporation and plaintiff fiduciary duties.

25 4.3 Defendants' above-described actions and conduct constitute breach of the fiduciary  
26 duties owed by defendants to the Corporation and plaintiff.

1           4.4    As a proximate result of defendants' breach, the Corporation and plaintiff have been  
2 damaged in an amount to be proven at trial.

## V

SECOND CLAIMNegligence

3  
4  
5  
6           5.1    Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
7 through 4 above.

8           5.2    Defendants' above-described actions and conduct constitute breach of defendants'  
9 obligations under Idaho Code §§ 30-1-830 and 30-1-842, to discharge their duties as directors and as  
10 an officer in good faith, with the care an ordinarily prudent person in a like position would exercise  
11 under similar circumstances, and in a manner they reasonably believe to be in the best interests of the  
12 Corporation.

13  
14           5.3    As a proximate result of defendants' breach, the Corporation and plaintiff have been  
15 damaged in an amount to be proven at trial.

## VI

THIRD CLAIMConversion

16  
17  
18  
19           6.1    Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
20 through 5 above.

21           6.2    As set forth above, defendants improperly caused the use of corporate property and  
22 expenditure of corporate funds for the purchase of gifts and payment of improper salaries for the  
23 personal benefit of defendant William McCann, Jr., his family, and his friends.

24  
25           6.3    Defendants were unjustified in converting corporate funds and property for the  
26 personal benefit of defendant William McCann, Jr., his family, and his friends.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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LAW OFFICES OF

Winston &amp; Cashatt

1           6.4   Defendants' conduct constitutes conversion of corporate funds and property.

2           6.5   The Corporation and plaintiff are rightfully entitled to corporate funds and property  
3 converted in an amount to be proven at trial.

4  
5                               VII  
6                               FOURTH CLAIM  
7                               Self-Dealing

8           7.1   Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
9 through 6 above.

10           7.2   As set forth above, defendants engaged in various actions and conduct, entered into  
11 various transactions on behalf of the Corporation, and otherwise utilized corporate funds and  
12 property for the purpose of personally benefiting defendant William McCann, Jr., his family, and his  
13 friends.

14           7.3   The above-described actions of defendants constitute a breach of defendants' duty to  
15 avoid self-dealing.

16           7.4   As a proximate result of defendants' breach, the Corporation and plaintiff have been  
17 damaged in an amount to be proven at trial.

18  
19                               VIII  
20                               FIFTH CLAIM  
21                               Conflicting Interest Transactions

22           8.1   Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
23 through 7 above.

24           8.2   Defendants' above-described actions and conduct involve the commitment of the  
25 Corporation in transactions in which defendants, and/or related persons to defendants, have a  
26 conflicting interest.



1           8.3     At the time the above-described transactions were consummated by the Corporation,  
2 defendants knew that defendants and/or related persons were parties to the transactions, or that the  
3 transactions had beneficial financial significance to defendants and/or related persons, and that their  
4 interests would reasonably be expected to exert an influence on defendants' judgment in voting in  
5 their capacities as directors.  
6

7           8.4     According to the circumstances at the time the above-described transactions took  
8 place, the transactions were not fair to the Corporation.  
9

10           8.5     The above-described transactions were not approved by a majority of qualified  
11 directors or qualified shares as required by Idaho Code §§ 30-1-862 and 30-1-863, and are thereby  
12 ineffective.  
13

14           8.6     The above-described transactions constitute breach of defendants' obligations under  
15 Idaho Code §§ 30-1-860 through 30-1-863.  
16

17           8.7     As a proximate result of defendants' engagement in conflicting interests transactions,  
18 the Corporation and plaintiff have been damaged in an amount to be proven at trial.  
19

20           WHEREFORE, plaintiff requests the following relief, the amount of which is alleged to be  
21 within the jurisdictional limit, against defendants, jointly and severally as follows:  
22

23           1.     For an award for all compensatory damages caused by or arising from the defendants'  
24 conduct;  
25

26           2.     That a judgment be entered in favor of plaintiff in the amount to be proven at trial  
plus interest accruing with post judgment interest as allowed by law;

3. For the forfeiture of defendants' compensation received by the Corporation in an amount to be shown at the time of trial;

4. That plaintiff be awarded his attorneys' fees and costs incurred to bring this derivative action pursuant to Idaho Code § 30-1-746(1);

5. That plaintiff be awarded his attorneys' fees and costs, as allowed under applicable law, including Idaho Code § 12-121; and

6. For such other and further relief as the Court deems just and proper.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2000.

TAMARA W. MUROCK, IBA #5886  
MARIS BALTINS, WSBA # 09107  
WINSTON & CASHATT  
Attorneys for Plaintiff

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

LAW OFFICES OF  
*Winston & Bashart*  
250 NORTHWEST BLVD., SUITE 107A

## VERIFICATION

STATE OF IDAHO )  
 )ss.  
County of Nez Perce )

RONALD R. McCANN, being first duly sworn upon oath, deposes and says:

That he has read the above and foregoing Amended Complaint for Damages for Recovery of Corporate Property, Breach of Fiduciary Duties, Negligence, Conversion, Self-Dealing, and Conflicting Interest Transactions, knows the contents thereof, and believes the same to be true.

\_\_\_\_\_  
RONALD R. McCANN

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of \_\_\_\_\_, 2000.

\_\_\_\_\_  
Notary Public in and for the State of

\_\_\_\_\_, residing at \_\_\_\_\_

My appointment expires \_\_\_\_\_

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

111  
LAW OFFICES OF

Winston & Cashatt  
2000 UNIVERSITY BLVD. SUITE 1000  
BOISE, IDAHO 83725

05/06/1996

10

\*\*\* FAX \*\*\*

06000049 P.02

COPY

## LAST WILL AND TESTAMENT

OF

WILLIAM V. McCANN, SR.

I, WILLIAM V. McCANN, SR., a legal resident of Lewiston, Idaho, being of sound mind, do make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and codicils heretofore made by me.

Such revocation includes but is not limited to my Last Will and Testament executed on June 12, 1974, Codicil to my Last Will and Testament executed on December 3, 1974, my Last Will and Testament executed on October 29, 1985, First Codicil to my Last Will and Testament dated March 13, 1992, my Last Will and Testament executed on March 5, 1996.

## ARTICLE I.

I am married and my wife's name is ANNA G. McCANN. I hereby declare that on the date of execution of this Will I have the following children who are living:

WILLIAM VERN McCANN, JR., born [REDACTED] and

RONALD ROBERT McCANN, born [REDACTED].

1/11/96 William V. McCann, Sr. 112

05/06/1996 10:21 KKKK PANAFAX UF-400 KKKK

06E09049 P.03

That at the time of the execution of this Will, I have the following grandchildren:

MALINDA ANN McCANN, born [REDACTED] and

WILLIAM VERN McCANN, III, born [REDACTED]

I have at the time of signing this Last Will and Testament two (2) great grandchildren who are only provided for herein through their parent MALINDA ANN McCANN.

#### ARTICLE II.

Each reference in this will to the children, descendants, or issue of myself or of any other person is intended to refer to and include only the lawful children, descendants or issue of such persons as well as lawfully adopted children.

#### ARTICLE III.

It is my desire and intention under this my Will and Testament to dispose of all my separate property and my share of the community property owned by myself and my wife.

#### ARTICLE IV.

I direct that all of my just debts and my funeral expenses be paid as soon as practicable after my death. In the event that any property or interest in property passing under this will or by operation of law or otherwise by reason of my death shall be encumbered by a mortgage or a lien or shall be pledged to secure

*William V. McCann, Sr.*

William V. McCann, Sr.

113

05/06/1996 10:22 \*\*\*\*\* PAMPRX LF-400 REXX

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any obligation, it is my intention that such indebtedness shall not be charged to or paid from my estate but that the devisee, legatee, joint owner or beneficiary shall take such property or interest in property subject to all encumbrances existing at the time of my death.

## ARTICLE V.

I direct that all estate, inheritance, transfer, legacy, succession, and other death taxes and duties of any nature payable by reason of my death which may be assessed or imposed upon or with respect to property passing under this will or property not passing under this will shall be paid out of my estate as an expense of administration and no part of said taxes shall be apportioned or prorated to any legatee or devisee under this will or any person owning or receiving any property, including life insurance, not passing under this will.

## ARTICLE VI.

I hereby bequeath and devise specifically as follows:

Should my wife, ANNA G. McCANN, survive me then

To GARY MEISNER as TRUSTEE of the WILLIAM V. McCANN, SR. STOCK TRUST as provided for in Article VIII herein my 66,600 shares of common stock of McCann Ranch & Livestock Co., Inc., an Idaho corporation, which is my sole and separate property.

To my son, WILLIAM V. McCANN, JR.:

05/06/1996

10:24

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06609049 P.05

One leather-backed rocking chair with leather  
seat and elk carving;

All phonographs and cabinets for said  
phonographs;

All my sleigh bells and school bells; and 1200

All my jewelry.

Should my wife ANNA G. McCANN predecease me then to  
WILLIAM V. McCANN, JR. my 66,600 shares of common stock  
of McCann Ranch & Livestock Co., Inc., an Idaho  
corporation, which is my sole and separate property.

To my son, RONALD ROBERT McCANN:

My guns and rifles; and

My player piano and all rolls for it.

To LARRY KENNEDY, son of DARLENE McCANN, wife of my son,  
RONALD ROBERT McCANN:

The sum of One Dollar (\$1.00) only.

If any of the individual beneficiaries named in this article  
shall not survive me, then the bequest or devise to such individual  
shall lapse and shall become part of my residuary estate and  
disposed of according to the provisions hereinafter contained.

#### ARTICLE VII.

I bequeath to my wife, ANNA G. McCANN, if living at my death,  
all of my clothing, automobiles, and all other tangible personal  
property not otherwise specifically bequeathed, owned by me at the  
time of my death. If my said wife shall not survive me, I bequeath

*William V. McCann*  
William V. McCann, Sr.

25/06/1996

10:11

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all of the aforesaid property in equal shares to my children who shall be living at the time of my death.

ARTICLE VIII.

I hereby create the WILLIAM V. McCANN, SR. STOCK TRUST the trustee of which shall be GARY MEISER and he shall receive 66,600 shares of common stock in the McCann Ranch & Livestock Co., Inc., an Idaho corporation, which is my sole and separate property.

Said WILLIAM V. McCANN, SR. STOCK TRUST shall be held, managed, controlled and distributed as follows:

A. Upon my death the Trustee shall hold, manage and control the property comprising the Trust estate, collect the income therefrom, and out of the same shall pay all taxes and other incidental expenses of the Trust, and shall hold or distribute the Trust estate and any income therefrom as provided hereinafter. The Trustee is empowered to sell to the Corporation whatever shares of stock are necessary to enable my estate to pay the estate and inheritance taxes due at the time of my death. The Trustee shall vote the stock and it is my intention that such Trustee shall vote the stock so as to create an income insofar as possible for my wife, ANNA G. McCANN.



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B. So long as the Trust continues, the Trustee shall pay to or apply for the benefit of my wife ANNA G. McCANN, so much of the income as Trustee in his discretion deems necessary for her support, care and maintenance. Any income not so distributed shall be accumulated and added to principal.

C. Upon the death of my wife, ANNA G. McCANN, the Trustee shall distribute the 66,600 shares of common stock plus any accumulated income to my son, WILLIAM V. McCANN, JR. It is my intention that if my son, WILLIAM V. McCANN, JR. survives myself and my wife that he shall be the sole owner of said 66,600 shares of common stock (or the remainder thereof) with all income therefrom to be his sole and separate property. In the event that my son shall predecease my wife, ANNA G. McCANN, then the stock shall be conveyed upon my death or the death of my wife, ANNA G. McCANN, should she survive me to GARY MEISNER as the TRUSTEE of the WILLIAM V. McCANN, SR. GRANDCHILDREN TRUST as provided for in Article X herein.

#### ARTICLE IX.

All the rest, residue and remainder of my estate, including all of my separate property, all of my own share of community property wheresoever situated (including property over which I have

*William V. McCann, Sr.*  
William V. McCann, Sr.

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a power of appointment); and all lapsed legacies and devisees, I bequeath and devise to my wife, ANNA G. McCANN, if she survives me. In the event my wife predeceases me, then I bequeath and devise said remainder to GARY MEISER the Trustee for the WILLIAM V. McCANN, SR. GRANDCHILDREN TRUST.

## ARTICLE X.

Said WILLIAM V. McCANN, SR. GRANDCHILDREN TRUST shall be held, managed, controlled and distributed as follows:

A. Upon my death the Trustee shall hold, manage and control the property comprising the Trust estate, collect the income therefrom, and out of the same shall pay all taxes and other incidental expenses of the Trust, and shall hold or distribute the Trust estate and any income therefrom as provided hereinafter. The Trustee is empowered to sell to the Corporation whatever shares of stock are necessary to enable my estate to pay the estate and inheritance taxes due at the time of my death.

B. So long as the Trust continues, the Trustee shall pay to or apply for the benefit of my grandchildren so much of the income and principal of the Trust as the Trustee in his discretion deems necessary for their support, care, maintenance and education (including college and postgraduate

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study, so long as pursued to advantage by the beneficiary), after taking into consideration to the extent the Trustee deems advisable their independent income and other resources known to the Trustee (including the capacity for gainful employment of any beneficiary who has completed or is not pursuing his or her education). Any income not so distributed shall be accumulated and added to principal. In making these payments, the Trustee may pay more to or apply more for some beneficiaries than others, and distributions may be made to one or more beneficiaries to the exclusion of others, if the Trustee deems this necessary in light of the circumstances, the size of the Trust estate and the probable future needs of the beneficiaries. In addition, the Trustee may, if he deems it advisable, apply income and principal of the Trust for the support of the guardian of the beneficiaries to the extent that such enhances the quality of care of my grandchildren without endangering the fulfillment of the key objective of this Trust which is to provide for the care and education of my grandchildren.

C. After my youngest grandchild reaches the age of thirty-five (35) years, the Trustee shall make distributions of the net income of the Trust annually (commencing with the calendar year said birthday occurs) and the final distribution

*William V. McCann, Sr.*  
William V. McCann, Sr.

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of the Trust corpus shall be made when my youngest grandchild reaches the age of forty-five (45) years.

D. In the event any beneficiary should predecease me or predecease the termination of this Trust leaving issue surviving him or her, said beneficiary's share shall pass to said beneficiary's children who survive him or her, in equal shares.

E. In the event any beneficiary should predecease me or predecease the termination of this Trust leaving no issue surviving him or her, said beneficiary's share shall pass to those beneficiaries who survive me, in equal shares.

F. Should all the beneficiaries of the Trust predecease the termination of the Trust, then the Trustee shall distribute any remaining Trust estate to my children who have not predeceased the termination of the Trust.

G. All receipts and expenditures shall be administered by the Trustee, subject to any limitations stated elsewhere herein and allocated as to principal and income as provided in the Uniform Principal and Income Act, being Chapter 10 of Title 68, Idaho Code, as now in effect and as it may hereafter be amended.

H. To carry out the purposes of the Trust created herein, and subject to any limitations stated elsewhere

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06625049 P.11

herein, the Trustee, is vested with all of the powers and authority as set forth in the Uniform Trustee's Powers Act, being Chapter 1 of Title 68, Idaho Code, as now in effect and as it may hereafter be amended.

The Trustee shall manage the Trust estate and may sell, exchange, lease for terms either within or beyond the duration of the Trust, lend, relend, invest and re-invest the Trust estate or any part thereof in any kind of property which men of prudence, discretion and intelligence exercise for their own account, specifically including, but not by way of limitation, acquisition of corporate obligations of every kind and preferred and common stocks. The Trustee shall have the same general powers that an individual being the absolute owner of real and personal property possesses not inconsistent with the purposes and intentions of the Trust. The Trustee is authorized to retain in the Trust, in the same form as that in which they were received by the Trustee, assets of any kind, and to continue and operate any business or interest therein which may be received hereunder as long as the same produces a reasonable income, and it appears to the best interest and advantage of the Trust estate.

*William V. McCann, Sr.*  
William V. McCann, Sr.

05/05/1996 10:2 \*\*\*\*\* PANAFAX LF-400 \*\*\*\*\*

05539249 P.12

I. In no event is said Trust to last longer than the period required pursuant to Section 55-111, Idaho Code, governing suspension of power of alienation.

ARTICLE XI.

Should GARY WEISNER at any time be unable or unwilling to act as the Trustee of either or both the Trust(s), I hereby appoint CUMER L. GREEN as the Trustee of said Trust(s). If CUMER L. GREEN is unable or unwilling to act as such Trustee, I request that a Trustee be appointed by a court of competent jurisdiction.

ARTICLE XII.

If my wife and I, any other beneficiaries and I, or any primary and secondary beneficiary, die simultaneously or under such conditions that it cannot be determined from credible evidence which of us survived, the provisions made herein for my wife shall be construed as though she had survived me and my estate shall be distributed accordingly; any other person interested under this Will shall be deemed to have predeceased me; and, any secondary beneficiary shall be deemed to have predeceased the primary beneficiary.

ARTICLE XIII.

If any legatee, devisee, or taker under this Will shall interpose objections to its probate or in any other way contest it,

*William V. McCann, Sr.*

05/06/1996 10:21 \*\*\*\*\* PAGE 14 \*\*\*\*\*

05605049 P.13

such person shall forfeit his or her entire interest under this Will and the gift, bequest or devise made to such person shall pass as part of the residue of my estate; provided, however, that if such person is a residuary beneficiary, his or her interest shall be divided proportionately among the remaining residuary beneficiaries.

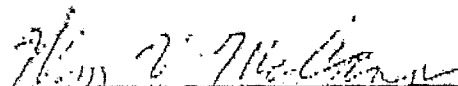
## ARTICLE XIV.

I request that my Personal Representative employ WILLIAM V. MCCANN, JR., as attorney, not only in connection with the probate of my Will, but also in connection with any and all other matters of a legal nature relating to the administration of the estate. In the event WILLIAM V. MCCANN, JR. is unable or unwilling to act as attorney, then I request that the Personal Representative employ CUMER L. GREEN, Boise, Idaho as such attorney.

## ARTICLE XV.

I hereby appoint my wife, ANNA G. MCCANN, to be the Personal Representative of this, my Last Will and Testament, and I direct that as such Personal Representative she not be required to execute a bond for the faithful performance of her duties.

In the event my wife shall predecease me, or shall fail for any reason to qualify as my Personal Representative, then in that event, I appoint my son, WILLIAM V. MCCANN, JR., of Lewiston, Idaho

  
William V. McCann, Sr.

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WINST & CASHATT

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P. 037

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as sole Personal Representative, to serve in such capacity without bond.

IN WITNESS WHEREOF, I subscribe my name this 1<sup>st</sup> day of May, 1996.

William V. McCann, Sr.  
WILLIAM V. MCCANN, SR.

The foregoing instrument, consisting of fourteen (14) pages, including the following page, was, on the date hereof, signed, published and declared by the above named Testator to be his Last Will and Testament, in the presence of us, who at his request and in his presence and in the presence of each other, and on the same date, have subscribed our names as witnesses thereto.

[Signature] residing at Boise, Idaho  
Sinda Fall residing at Moscow, Idaho

William V. McCann, Sr.  
William V. McCann, Sr.

MEMORANDUM AND SUPPORT OF MOTION TO DISMISS

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05/06/1996 10:32 \*\*\*\*\* PANAFLEX LF-400 \*\*\*\*\*

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STATE OF IDAHO )  
                   ) ss.  
 County of Nez Perce )

We, WILLIAM V. McCANN SR., and Cumer, Green and LINDA FALL, the Testator and witnesses, respectively, whose names are subscribed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the Testator signed and executed said instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the Testator, signed the will as witness and to the best of his knowledge the Testator was at that time an adult, of sound mind and under no constraint or undue influence. -

William V. McCann Sr.  
 WILLIAM V. McCANN SR., Testator

[Signature]  
 Witness

Linda Fall  
 Witness

SUBSCRIBED, SWORN to and acknowledged before me by WILLIAM V. McCANN SR. the Testator, and subscribed and sworn to before me by Cumer, Green and LINDA FALL witnesses, this 10th day of May, 1996.

Chantell O. Holsinger  
 Notary Public for Idaho  
 Residing at Lewiston  
 My commission expires 10-1-98

William V. McCann, Sr.

# Winston & Cashatt

## LAWYERS

A PROFESSIONAL SERVICE CORPORATION

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Beverly L. Anderson  
Marie Estline  
Robert F. Benschel  
Richard L. Cason  
Bonnie L. Chainey \*  
Robert H. Crick  
Patrick J. Cronin \*  
Kevin J. Curtis  
Stephen L. Farnell  
John H. Guin \*  
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Tim M. Higgins  
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Michael J. Cronin

Leo N. Cashatt (1910 - 1977)  
Joseph J. Rakoke (1921 - 19  
Patrick H. Winston (1904 - 19

All members admitted in Washington  
\* Additionally admitted in Idaho  
\* Additionally admitted in California  
\* Additionally admitted in Montana

Website: www.winstoncashatt.com  
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December 6, 1999

Mr. Cumer L. Green  
Green Law Offices  
P. O. Box 2597  
1505 Tyrell Lane  
Boise, ID 83701-2597

EXHIBIT

"B"

Re: McCann Ranch & Livestock Company, Inc.

Dear Mr. Green:

I have preliminarily reviewed the materials supplied by you regarding the McCann corporation and hereby identify certain problems which when resolved would do much to foster the spirit of cooperation to divide the assets of the corporation as we discussed in our last meeting.

The concerns raised in your letter of November 18, 1999 were timely. I too have noticed and identified certain problems regarding the use of corporate assets and the payment of corporate property which, while so often practiced in the context of closely held corporations, must be avoided if we are to regard the corporation as a separate legal entity with primary allegiance to all its shareholders.

I have already raised this concern by suggesting that Mr. Ron McCann be paid a salary equal to his brother for the service he contributes to the welfare of the corporation. This idea was not accepted. We therefore must ask that all amounts paid to or for the benefit of all family members be done in the context of legitimate compensation or as a distribution on shares.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS  
A review of the tax returns of the McCann family for the past 12 years reveals that salaries were paid to certain individuals which should be treated as distributions on shares as opposed to legitimate

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Cumer L. Green  
December 6, 1999  
Page 2

A review of the Will of William V. McCann, Sr. reveals that he specifically provided that an income be created for Mrs. McCann from the trust left in his Will. The Will also provides that the Trustee is to sell (redeem) to the corporation shares of stock to enable the estate to pay the estate and inheritance taxes.

It appears that neither of these instructions of Mr. McCann, Sr. have been carried out.

The estate and Mrs. McCann are indebted to the corporation to the extent of \$256,000.00 and \$81,000.00 respectively. Instead of creating an income stream for Mrs. McCann through the appropriate means of redemption of shares, an improper and unsupportable consulting fee has been created which would result in substantial problems to the corporation if the income tax returns were audited by the Internal Revenue Service.

These are *ultra vires* acts which are improper under state and federal law and are counter to Mr. McCann, Sr.'s directions in his Will.

We are in the process of reviewing all of the properties and will make our selection of the desired properties known to you for the corporate division.

In the meantime, it is Mr. Ron McCann's request that the above mentioned problems be corrected so that the proper equity ownership of the corporation is reflected in the books and records.

As to the concerns raised in your letter of November 18, 1999, a more accurate recital of the facts may be that all family members, including Mr. William V. McCann, Jr.'s children, have repeatedly used corporate assets and in fact have had accidents with such assets that have resulted in substantial damage and detriment to the corporation. As we have discussed before, it probably would be best to concentrate on what we can do to correct the relationship between the brothers in the future as opposed to revisiting past perceived wrongs.

Thank you for your consideration of these matters.

Very truly yours,

MARIS BALTINS

MXB:stt

*Winston & Cashatt*LAWYERS  
A PROFESSIONAL SERVICE CORPORATION

C. Matthew Anderson \*  
Beverly L. Anderson  
Marla Ballins  
Robert P. Baschel  
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Robert H. Crick  
Patrick J. Cronin \*  
Kevin J. Curtis °  
Stephen L. Farnell  
John H. Gutz \*  
Matthew E. Hargett °°  
Tim M. Higgins  
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Joseph J. Bakofke (1921 - 1997)  
Patrick H. Winston (1904 - 1998)

All members admitted in Washington  
\* Additionally admitted in Idaho  
° Additionally admitted in California  
! Additionally admitted in Montana

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January 21, 2000

## Facsimile Transmittal / U.S. Mail

Cumer L. Green  
Green Law Offices  
P.O. Box 2597  
1505 Tyrell Lane  
Boise, ID 83701-2597

Re: McCann Ranch & Livestock Co.

Dear Mr. Green:

I was very disappointed to learn that Mr. Bill McCann has given direction to start logging the Forest Ranch after our discussion that such action is not legally required and after Mr. Ron McCann's repeated requests to cease logging on the property which he may wish to take into his corporation after the corporate split up.

In your January 12, 2000 letter it appears that Mr. Bill McCann is purposely using logging as a club to force Mr. Ron McCann into a premature settlement offer while Mr. Ron McCann does not have sufficient information to make an informed decision.

As you are aware, the total fair market value of McCann Ranch and livestock is likely to be in the fifteen million dollar (\$15,000,000.00) range and contains over eighteen (18) separate commercial and ranch properties.

Each of these properties must be investigated and reviewed so that Mr. Ron McCann makes a fully informed decision.

## MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

It is patently unfair to force Mr. Ron McCann into a quick decision when his brother has had the opportunity to be involved in all details of the properties for at least the last fifteen (15) years.

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Cumer L. Green  
January 21, 2000  
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I appreciate your consent to allow Mr. Ron McCann's accountant and appraiser to have full access to all of the corporate books and records. Mr. Ron McCann's accountant will come to the corporate office on January 25, 2000 at 9:00 a.m.

In order to get this matter back on track toward resolution it is my request that you ask Mr. Bill McCann to get the loggers to cease their activities.

We will proceed in a reasonable manner to complete our investigation and present our offer for the split up as soon as such investigation is complete.

As we have discussed before, if we all act in good faith we should be able to accomplish a settlement of this matter.

Thank you for your consideration of this matter.

Very truly yours,

MARIS BALTIMS

MXB:stt

*Winston & Cashatt*

LAWYERS

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 Joseph J. Rekofke (1921 - 1987)  
 Patrick H. Winston (1904 - 1998)

All members admitted in Washington  
 \*Additionally admitted in Idaho  
 \*Additionally admitted in California  
 \*Additionally admitted in Montana

June 9, 2000

## Facsimile Transmission &amp; US Mail

Mr. Cumer L. Green  
 Green Law Offices  
 P. O. Box 2597  
 1505 Tyrell Lane  
 Boise, ID 83701-2597

Re: McCann Ranch & Livestock Co.

Dear Mr. Green:

Since December 1999, we have patiently waited for the corporation to take action to remedy those issues we have outlined as being serious violations of law and otherwise not in the best interests of the corporation. Despite our repeated attempts, however, the corporation has engaged in numerous tactics to delay the resolution of these matters.

As a result, this letter, in addition to those provided to you on behalf of the corporation on December 6, 1999 and January 21, 2000, serves as written demand pursuant to Idaho Code § 30-1-742 by Ron McCann upon the corporation to take suitable action to remedy the following illegal or improper acts of the corporation:

1. The loan in excess of \$337,000.00 made to the estate of Mr. William McCann, Sr. and Mrs. Gertrude McCann is an improper business use of corporate assets, and in light of the direction in Mr. William McCann, Sr.'s Will, the corporation shall seek the return of such funds, and redeem the company shares of the estate and Mrs. McCann.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

2. Payments made to or on behalf of Mrs. Gertrude McCann as compensation or consulting fees are inappropriate whereas Mrs. Gertrude McCann provides no services to the

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provide an income stream to Mrs. McCann, the corporation shall seek reimbursement of such improper compensation, and redeem the shares of Mrs. McCann.

3. Payments by McCann Ranch & Livestock Co. for monthly inspection services by DBS have been inappropriately reflected on a Form 1099 as opposed to a W-2. In 1999, the Form 1099 reflects miscellaneous payments of \$19,476.00 to DBS. In 1998, the Form 1099 reflects payments of \$34,908.00 to DBS. The company checks were endorsed "DBS - Bill Skelton." Mr. Skelton was listed as the immediate supervisor of corporate employee Matt Albright in a Department of Labor Claim - Employer Separation Statement. The statement was signed by Matt Albright and Bill McCann, Jr. The corporation shall properly list Mr. Skelton as an employee, issue Forms W-2 to Mr. Skelton, and take immediate actions to pay the employment taxes associated with Mr. Skelton's employment.
4. Employees of McCann Ranch & Livestock Co. are being paid by the company to do work other than company work. Examples pertaining to this issue include:
  - a. Larry Watkins working at Garden City Apartments for 30 hours on one time card and 25 hours on another;
  - b. Matt Albright doing sewer work at 704 Castle Street which is owned by Lori McCann, for 43 hours on 8-12-99; and
  - c. Joe Heing doing sewer work at 704 Castle Street on company time.

The corporation shall immediately cease paying corporate employees for the performance of noncorporate work, and seek reimbursement for such payments from those individuals or entities who benefited from such use of corporate employees.

5. Company expenditures in 1999 at B&B Auto Brite were inappropriate corporate expenditures. Examples of this issue include:
  - a. Expenditures totaling \$234.35 made by William V. McCann, Jr. for his Mercedes;
  - b. Expenditures totaling \$181.30 made by Chantell Hoisington for her personal vehicle;
  - c. Expenditures totaling \$80.65 made by Gertrude McCann for her personal vehicles;
  - d. Expenditures totaling \$12.95 made by Jason Beck for his personal vehicle;
  - e. Expenditures totaling \$24.94 made by Aaron Beck for his personal vehicle;
  - f. Expenditures totaling \$12.95 made by Bill Skelton; and

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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Mr. Cumer L. Green  
June 9, 2000  
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g. Expenditures totaling \$69.95 made by William V. McCann, III.

The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such payments from those individuals or entities who benefited therefrom.

6. Company expenditures at Brunnel Tire and Auto Service Center were inappropriate corporate expenditures. Examples of this issue include:

- a. Expenditures totaling \$256.15 made by Howard Hoffman for his personal pickup;
- b. Expenditures totaling \$707.03 made by Gertrude McCann for her Honda, Mercedes and truck;
- c. Expenditures totaling \$23.05 made by William V. McCann, Jr. for his personal vehicle;
- d. Expenditures totaling \$459.46 made by William V. McCann III for a Mazda pickup;
- e. Expenditures totaling \$291.61 made by William V. McCann, Jr.'s stepson's vehicle;
- f. Expenditures totaling \$303.13 for a 1989 Ford Escort, license number 1L50910; and
- g. Expenditures totaling \$220.70 for a Toyota 4x4, license number N46992 owned by Casey and Company.

The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.

7. Company expenditures at Forest Auto Wrecking were inappropriate corporate expenditures. Examples of this issue include:

- a. Expenditures totaling \$417.50 for a Ford Escort engine and miscellaneous Probe parts;
- b. Expenditures totaling \$16.90 for a Mazda B2200 tailgate handle assembly;
- c. Expenditures totaling \$367.50 for a 1990 Toyota pickup transmission;
- d. Expenditures totaling \$52.30 for a pickup motor;



Mr. Cumer L. Green

June 9, 2000

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- e. Expenditures totaling \$78.75 for a 1984 Plymouth minivan quarter window; and
- f. Expenditures totaling \$131.25 for a Ford van rear bumper.

The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.

- 8. Company expenditures at Schrader's Truck and Auto Repair were inappropriate corporate expenditures. Examples of this issue include:
  - a. Expenditures totaling \$260.54 for a 1991 Toyota 4x4;
  - b. Expenditures totaling \$260.54 for a Mazda pickup;
  - c. Expenditures totaling \$79.10 for a Ford van; and
  - d. Expenditures totaling \$379.49 for a 1990 Ford pickup.

The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.

- 9. A corporate expenditure of \$120.00 at Master's Body Shop for work on a 1998 Chevy, license number N5332T was an inappropriate corporate expenditure. The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.
- 10. A corporate expenditure of \$92.40 at Auto Trim and Design for work on a 1998 Chevy, license number N5332T was an inappropriate corporate expenditure. The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.
- 11. A corporate expenditure of \$198.52 by William V. McCann III at Bann & Bann Auto Service was an inappropriate corporate expenditure. The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.
- 12. The black stock truck owned by the company is being used for personal storage for William McCann, Jr. and thereby causing the company to incur additional expenses by hiring out the hauling of company livestock. The corporation shall immediately cease the use of the truck for noncorporate use, and seek reimbursement for such use

Mr. Cumer L. Green  
June 9, 2000  
Page 5

13. The corporation has entered into various logging contracts for the logging of timber on corporate property, and such logging is substantially depleting the value of the property. The corporation shall immediately cease all logging of timber on corporate property.

In the event no corrective action is taken within the next ten day, and since you have ignored our earlier demands made on December 6, 1999 and January 21, 2000, an action against the following individuals and entities will be commenced with no further notice to you:

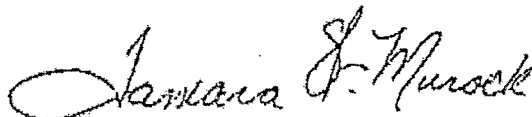
1. Mr. William V. McCann, Jr., as an officer, director and shareholder of McCann Ranch & Livestock Co.;
2. McCann Ranch & Livestock Co., an Idaho corporation; and
3. Gary E. Meisner, as Trustee of the William V. McCann, Sr. Stock Trust, and as a director and shareholder of McCann Ranch & Livestock Co.

Attached for your review is a draft Complaint for Damages for Recovery of Corporate Property, Breach of Fiduciary Duties, Negligence, Conversion, Self-Dealing, and Conflicting Interest Transactions which shall be filed in the event the corporation does not undertake the above demanded actions.

As we have previously discussed on numerous occasions, many of the above demanded issues may subject the corporation, its directors and its officers to substantial penalties imposed by the Internal Revenue Service. For this reason, we request that immediate attention be given to this demand, and that the above demanded actions be undertaken. We simply cannot allow you to postpone action on these demands another 60 days that without risk to the Corporation and Mr. Ron McCann in his position as a director of the corporation.

Thank you for your consideration.

Very truly yours,



MARIS BALTINS  
TAMARA W. MUROCK

cc: Ron McCann  
Bob Myers  
Gary E. Meisner  
Larry J. Durkin

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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*Winston & Cashatt*

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All members admitted in Washington  
 • Additionally admitted in Idaho  
 • Additionally admitted in California  
 • Additionally admitted in Minnesota  
 • Additionally admitted in Texas

FACSIMILE TRANSMITTAL

PLEASE DELIVER THE FOLLOWING MESSAGE TO:

NAME: Mr. Merlyn W. Clark

COMPANY: Hawley Troxell Ennis &amp; Hawley

FAX NUMBER: 208-342-3829

FROM: TAMARA W. MUROCK / stt

TRANSMISSION DATE: August 1, 2000

C/M No. 102699/105340

The following documents are transmitted herewith:

1. Motion to Amend Complaint; and
2. Memorandum in Support of Motion to Amend Complaint.

SENDING OPERATOR: stt NUMBER OF PAGES (including cover page): 47  
CONFIRMATION WILL FOLLOW BY MAIL/COURIER.  
CONFIRMATION WILL NOT FOLLOW.

PLEASE CALL (509) 838-6131 IF NOT RECEIVING PROPERLY.

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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# EXHIBIT 3

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3 250 Northwest Boulevard  
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5 Coeur d'Alene, Idaho 83814  
6 Telephone: (208) 667-2103

7 MARIS BALTINS  
8 WINSTON & CASHATT  
9 601 W. Riverside, Suite 1900  
10 Spokane, Washington 99201-0695  
11 Telephone: (509) 838-6131

12 Attorneys for Plaintiff

13  
14 DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
15 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

16 RONALD R. McCANN, individually and )  
17 as a shareholder of McCANN RANCH & )  
18 LIVESTOCK CO., )

Case No. CV 00-01111

19 Plaintiff,

20 vs.

21 WILLIAM V. McCANN, JR., as an )  
22 officer, director and shareholder of )  
23 McCANN RANCH & LIVESTOCK CO., )  
24 GARY E. MEISNER, as a director and )  
25 shareholder of McCANN RANCH & )  
26 LIVESTOCK CO., and McCANN )  
RANCH & LIVESTOCK, CO., an Idaho )  
Corporation, )

Defendants. )

(1) SUPPLEMENTAL MEMORANDUM IN  
SUPPORT OF PLAINTIFF'S MOTION TO  
AMEND COMPLAINT; and  
(2) SUPPLEMENTAL RESPONSE TO  
(A) DEFENDANT GARY E. MESINER'S  
MOTION TO DISMISS; and  
(B) DEFENDANT WILLIAM V. McCANN  
JR.'S MOTION FOR RECONSIDERATION;  
and  
(3) RESPONSE TO DEFENDANT McCANN  
RANCH & LIVESTOCK CO.'S MOTION TO  
DISMISS PURSUANT TO I.C. § 30-1-744

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

## I. INTRODUCTION

During the August 8, 2000 hearing on defendants' motions to dismiss, the Court denied defendants' motions and stayed proceedings in this case until September 9, 2000. The Court stated its anticipation that plaintiff would file an amended complaint omitting those corrective actions undertaken by the board of directors of McCann Ranch & Livestock Co. (the "Corporation") during the stayed period.

Accordingly, plaintiff, Ronald R. McCann, hereby submits this Supplemental Memorandum in Support of Plaintiff's Motion to Amend Complaint. Plaintiff's Amended Complaint now alleges those corporate acts and conduct that have yet to be corrected, and alleges individual and shareholder derivative causes of action based upon: (1) breach of fiduciary duties; (2) negligence; (3) conversion; (4) self-dealing; and (5) conflicting interest transactions. A true and correct copy of the Amended Complaint for Damages for Recovery of Corporate Property, Breach of Fiduciary Duties, Negligence, Conversion, Self-Dealing, and Conflicting Interest Transactions is attached hereto as Exhibit "A."

Plaintiff also submits this Memorandum in Response to the following motions and supporting memoranda filed by defendants after the stayed period: (1) Defendant Gary E. Meisner's Motion to Dismiss the Complaint Against Him as a Director of McCann Ranch & Livestock, Co.; (2) Defendant William V. McCann, Jr.'s Motion for Reconsideration Re: Motion to Dismiss; and (3) McCann Ranch & Livestock Co.'s Motion to Dismiss Pursuant to I.C. § 30-1-744.

## II. RESTATED FACTS

Plaintiff filed his original complaint on June 19, 2000. At that time, the Corporation failed to address any of plaintiff's demands since the summer of 1999, that various improper corporate actions and conduct be corrected. Beginning in August 2000, the Corporation's board of directors reviewed

1 plaintiff's demands and made efforts to correct only some of those actions of which plaintiff  
2 complained. (Affid. of Ronald R. McCann, ¶¶ 18, 24-31).

3 Defendant McCann Ranch and Livestock, Co. is an Idaho corporation incorporated in 1974,  
4 made up of the following three shareholders: (1) Ronald McCann as a 36.7% shareholder;  
5 (2) William V. McCann Jr. as a 36.7 % shareholder; and (3) Gary E. Meisner as the Trustee of the  
6 William V. McCann, Sr. Stock Trust as a 26.6% shareholder. (Affid. of Ronald R. McCann, ¶¶ 4-6).

7 Plaintiff and Defendant McCann, Jr. are the children of Anna Gertrude McCann ("Mrs.  
8 McCann") and William V. McCann, Sr. ("Mr. McCann, Sr."), deceased. Since the Corporation's  
9 incorporation, plaintiff and defendant McCann, Jr. have worked for the Corporation in various  
10 capacities. Plaintiff hauled cattle and hay, constructed roads, performed general maintenance duties  
11 on company equipment, and performed other kinds of manual labor. (Affid. of Ronald R. McCann,  
12 ¶¶ 1-2, 4).

14 Defendant McCann, Jr. attended the University of Idaho Law School and has been admitted to  
15 practice as an attorney in the State of Idaho since 1969. In such capacity, defendant McCann, Jr.  
16 advised Mr. McCann, Sr. as to matters involving his estate planning and the preparation of his Last  
17 Will and Testament Mr. McCann, Sr. died on October 27, 1997. (Affid. of Ronald R. McCann, ¶¶  
18 3, 8).

19  
20 After Mr. McCann, Sr.'s death, defendant McCann, Jr. took control of the Corporation and  
21 served as attorney for Mr. McCann, Sr.'s estate. Through the manipulation of his friends, defendant  
22 McCann, Jr. caused the Corporation to conduct oppressive acts against the interests of plaintiff as a  
23 minority shareholder. Plaintiff was completely excluded from corporate information. Only after  
24 conducting a costly investigation, plaintiff recently uncovered various corporate acts which  
25 defendants now admit as improper. (Affid. of Ronald R. McCann, ¶¶ 10, 28, 31-32).

1 Plaintiff discovered that defendants have been distributing corporate funds and benefits to the  
2 majority shareholders, and excluding plaintiff, as a minority shareholder. Although the Corporation  
3 declared no dividends to shareholders during the last three years, defendant McCann, Jr. has received  
4 direct corporate distributions and benefits in excess of \$300,000. During this same period, plaintiff  
5 has received only \$500. (Affid. of Ronald R. McCann, ¶ 29-30; Affid. of Robert R. Myers, ¶5-6).

6 One device used by defendants to distribute funds to defendant McCann, Jr. to the exclusion  
7 of plaintiff is payment of an excessive salary. Even though defendant McCann, Jr. is engaged in the  
8 full-time practice of law and the business of the Corporation requires limited effort, defendants  
9 improperly increased defendant McCann, Jr.'s salary from \$58,000 to the unreasonable amount of  
10 \$144,000. (Affid. of Ronald R. McCann, ¶¶ 7, 9, 11-13; Affid. of Robert R. Myers, ¶¶ 3-4).

12 Also during the last three years, defendants have caused improper distributions and benefits to  
13 Mrs. McCann. Article VIII of Mr. McCann, Sr.'s Last Will and Testament creates the William V.  
14 McCann, Sr. Stock Trust (the "Trust") and appoints defendant Meisner as trustee. Defendant  
15 Meisner is a long-time friend of defendant McCann, Jr., and a member of the Corporation's board of  
16 directors. (Affid. of Ronald R. McCann, ¶¶ 6, 14).

17 The Will bequeathed Mr. McCann, Sr.'s 66,600 shares of common stock of the Corporation to  
18 defendant Meisner as trustee. Defendant Meisner is authorized to redeem the stock to pay estate and  
19 inheritance taxes due at the time of Mr. McCann, Sr.'s death, and directed to vote the stock so as to  
20 create an income insofar as possible for Mrs. McCann. Upon the death of Mrs. McCann, all  
21 unredeemed shares are to be distributed to defendant McCann, Jr. Consequently, redemption of the  
22 stock would deplete defendant McCann, Jr.'s future stock ownership in the Corporation. (Affid. of  
23 Ronald R. McCann, ¶ 6).



1 The estate of Mr. McCann, Sr. owed United States Estate Tax in the amount of \$167,384, and  
2 Idaho Estate Tax in the amount of \$32,994. The funds to pay the estate taxes were not obtained from  
3 a redemption of the Trust's stock as contemplated by the Will. Instead, defendants McCann, Jr. and  
4 Meisner, in their positions as directors, shareholders and an officer, caused the Corporation to loan in  
5 excess of \$255,792 to the estate for the payment of the taxes. At the time plaintiff filed his  
6 complaint, this loan in combination with an \$87,869.12 corporate receivable owing from the estate of  
7 McCann, Sr., resulted in an amount owing to the Corporation in excess of \$337,000. (Affid. of  
8 Ronald R. McCann, ¶ 15, 24).

9 After Mr. McCann, Sr.'s death, Mrs. McCann, the Trust's primary beneficiary, has been in  
10 need of income. However, the Trust's stock was not redeemed or voted to create an income as  
11 authorized and directed by Mr. McCann, Sr.'s Will. Instead, defendants, in their capacities as  
12 shareholders, directors, and an officer, came up with several improper devices of providing income to  
13 Mrs. McCann without redeeming shares. (Affid. of Ronald R. McCann, ¶ 15-20).

15 The first device consisted of paying Mrs. McCann an annual "consultant's fee" of \$48,000  
16 and a "consultant's bonus" of \$17,325. Because Mrs. McCann is 84 years old and furnished no  
17 substantive services in exchange for such fees, plaintiff demanded the payments cease and be repaid  
18 as unlawful distributions of corporate assets. Defendants then restructured the payments, and on  
19 September 6, 2000, approved the payments in the form of "deferred compensation." Plaintiff's  
20 counsel cautioned that such "deferred compensation" would be an improper corporate action, would  
21 be disallowed as a deductible expense, and may result in the imposition of tax deficiencies and  
22 penalties. Defendants then restructured the payments again, and approved payments in the form of  
23 "back rental" for Mrs. McCann's garage in an amount exceeding \$106,000. The new payments are  
24 for the alleged rental of Mrs. McCann's personal garage for the past 12-½ years. The rental of Mrs.  
25  
26

1 McCann's garage, however, is unnecessary for the operations of the Corporation, and serves merely  
2 as another method of providing improper corporate benefits to Mrs. McCann without redeeming the  
3 stock as envisioned by Mr. McCann, Sr.'s Will. (Affid. of Ronald R. McCann, ¶¶ 15-23).

4 In his original complaint, plaintiff additionally complained of various improper corporate  
5 expenditures, use of corporate property, and payment of corporate employees, and other improper  
6 transactions benefiting defendant McCann, Jr., his family, and his friends. On the eve of the August  
7 8, 2000 hearing on defendants' motions to dismiss, defendants informed plaintiff that action had  
8 finally been undertaken to remedy some of the issues of which plaintiff complained. At the August 9,  
9 2000 board of directors' meeting, defendant McCann, Jr. presented a letter addressing the improper  
10 corporate activities and admitting that errors had been made and corrective action would be taken.  
11 Defendant McCann, Jr. agreed, as president of the corporation, to take the following corrective  
12 actions:  
13

14 (a) To recover corporate funds in the amount of \$286,928.32 from the Trust;

15 (b) To appoint a committee to investigate past and present compensation of family  
16 members; and

17 (c) To identify and seek reimbursement for improper expenditures of corporate funds for  
18 excessive salaries, purchase of vehicles, insurance, services and other gifts to defendant William V.  
19 McCann, Jr. or his family or friends.

20 (Affid. of Ronald R. McCann, ¶25).

21 On September 6, 2000, after plaintiff successfully caused the repayment of \$286,928.32,  
22 plaintiff was removed from the board of directors by the combined votes of defendants at a special  
23 meeting of shareholders convened specifically for that purpose. (Affid. of Ronald R. McCann, ¶27).  
24 Not only have defendants acted to improperly benefit the majority shareholders to the detriment of  
25  
26

1 the Corporation and the exclusion of the minority shareholder, but they have effectively removed  
2 plaintiff from any voice in the Corporation's management. Plaintiff therefore brings suit in a  
3 derivative action to remedy those wrongful actions against the Corporation, and in his individual  
4 capacity to recover those losses he sustained separate and distinct from the other shareholders.

5 The Corporation is closely held. The defendants are long-time friends, and together constitute  
6 the majority control and domination of the Corporation's operations. In such position of control, the  
7 defendants have engaged in a pattern of self-dealing intended to confer corporate benefits upon  
8 defendant McCann, Jr., Mrs. McCann and selected third parties to the exclusion of plaintiff as a  
9 minority shareholder, and have conspired between themselves and others to deprive plaintiff any  
10 voice in the Corporation's management, all with the intent of oppressing plaintiff and rendering his  
11 interest in the Corporation virtually worthless.

12 In their capacity as majority shareholders, majority directors, and an officer, the defendants  
13 have acted in bad faith and have failed to correct all identified improper acts. Currently, the  
14 following improper corporate actions remain uncorrected and therefore form the basis of plaintiff's  
15 Amended Complaint:

16 Amended Complaint:

- 17 (1) Excessive salary to defendant William V. McCann, Jr.;
- 18 (2) Payments exceeding \$106,000 to Mrs. McCann for the rental of her garage;
- 19 (3) Reimbursement for fees and costs to defendants McCann, Jr. and Meisner to correct  
20 improper corporate acts;
- 21 (4) Failure to reimburse the Corporation for the damages caused to the Corporation after  
22 correction of the now admitted improper acts;
- 23 (5) Failure to seek reimbursement to the Corporation for a receivable from the estate of  
24 Mr. McCann, Sr. in the amount of \$87,869.12; and  
25  
26

(6) The removal of plaintiff as a member of the board of directors of the Corporation.

### III. ARGUMENT

#### 1. Standard for Dismissal.

As more fully set forth in Plaintiff's Memoranda in Response to Defendants' Motions to Dismiss dated August 1, 2000, the motion to dismiss presented under Idaho Rule of Civil Procedure 12(b)(6) has generally been viewed with disfavor. See Wackerli v. Martindale, 82 Idaho 400, 402, 353 P.2d 782, 783 (1960). In reviewing a Rule 12(b)(6) dismissal motion, the nonmoving party is entitled to have all inferences from the record viewed in his favor and only then may the question be asked whether a claim for relief has been stated. Miles v. Idaho Power Company, 116 Idaho 635, 778 P.2d 757 (1989). Every reasonable intendment will be made to sustain a complaint against a 12(b)(6) motion. Ernst v. Hemenway and Moser, Co., Inc., 120 Idaho 941, 946, 821 P.2d 996, 1001 (Ct. App. 1991), *modified*, 126 Idaho 980, 895 P.2d 581 (1995).

#### 2. Plaintiff's Causes of Action are Not Moot.

Although defendants have caused the Corporation to finally take action to correct some of the improper corporate acts plaintiff originally complained, the above-listed improper and significant actions have yet to be corrected and are therefore subject to this court's review. The Courts will protect a minority shareholder when the dominant majority stockholders use their power to gain undue advantage to themselves at the expense of the corporation or its minority owners. 18A Am Jur 2d, Corporations § 762 (1985).

As majority shareholders and directors, defendants owe fiduciary duties to plaintiff as a minority shareholder. This fiduciary duty is well established:

In almost every state, majority, dominant, or controlling shareholders, or a group of shareholders acting together to exercise effective control, are held to owe a fiduciary duty to the minority shareholders, as well as to the other majority shareholders and to the corporation, comparable to the obligation owed by the officers and directors of the

1 corporation. And where a majority or controlling shareholder is also a director, then  
2 the fiduciary duties apply in both capacities.  
3 18A Am. Jur. 2d, Corporations § 764 (1985). The dealings of the dominant or controlling  
4 stockholders or a group of stockholders, are therefore subjected to rigorous scrutiny. See Pepper v.  
5 Litton, 308 U.S. 295, 306 (1939).

6 Majority stockholders have a real duty to protect the interests of the minority in the  
7 management of the corporation, especially where they undertake to run the corporation without  
8 giving the minority a voice in it. 18A Am Jur 2d, Corporations § 764, citing Zahn v. Transamerica  
9 Corp., 162 F.2d 36, 42 (3<sup>rd</sup> Cir. 1947); Tower Hill-Connellsville Coke Co. of West Virginia v.  
10 Piedmont Coal Co., 64 F.2d 817, 824 (4<sup>th</sup> Cir. 1933).

11 Defendants assert that their conduct is governed by the business judgment rule. However, the  
12 appropriate standard applicable to defendants' conduct is that of intrinsic or inherent fairness which  
13 encompasses obligations of good faith, loyalty, honesty, and full disclosure of material facts. See  
14 18A Am Jur 2d, Corporations, § 773 (1985). The intrinsic fairness standard is far stricter than the  
15 decidedly weaker business judgment standard. See 18A Am Jur 2d, Corporations § 773 (1985). This  
16 higher standard derives from the knowledge of human characteristics and motives that where a  
17 director or controlling stockholder stands to benefit personally from a decision as director or  
18 controlling stockholder, his or her business judgment is likely to be affected by personal interest. In  
19 such a circumstance, the law requires that the majority's actions be intrinsically fair to those in the  
20 minority. See Re Reading Co., 551 F.Supp. 1205, 1215 (E.D. Penn. 1982), *aff'd without opinion* 709  
21 F.2d 1495 (3<sup>rd</sup> Cir. 1983), and *rev'd on other grounds* 711 F.2d 509 (3<sup>rd</sup> Cir. 1983).

22 Invocation of the intrinsic fairness standard is predicated upon the existence of two factors:  
23 majority control and domination, and majority self-dealing. Id. at 1216. The concept of control and  
24 domination is defined as a direction of corporate conduct in such a way as to comport with the wishes  
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1 or interests of the persons doing the controlling. See Id. at 1217. Self-dealing is present when the  
2 dominant party derives benefits in which the minority shareholders are denied the right to participate.  
3 Id. By virtue of their domination, the majority shareholders cause the corporation to act in such a  
4 way that they receive something of value to the exclusion of, and detriment to, the minority  
5 stockholder. See Burton v. Exxon Corp., 583 F Supp. 405, 415 (S.D.N.Y. 1984).

6 Defendants have combined their voting power in such a manner to produce substantial  
7 corporate distributions and other benefits for the majority shareholders and to the exclusion of  
8 plaintiff, the minority shareholder. As such, defendants owe the fiduciary duty of intrinsic fairness.  
9 The burden of demonstrating the intrinsic fairness of their actions is on defendants. Id. at 416.

10 As majority shareholders and directors, a fundamental aspect of defendants' fiduciary  
11 obligation is the right of the minority to participate pro rata in the returns of the enterprise. Southern  
12 Pacific Co. v. Bogert, 250 U.S. 483, 487-88 (1919). In failing to permit a minority stockholder to  
13 obtain a monetary return from his stock ownership comparable to the benefits received by the  
14 majority shareholders, such majority shareholders breach their fiduciary obligation of fairness. 18A  
15 Am Jur 2d, Corporations § 778 (1985), citing Re Reading Co. 551 F. Supp. at 1218.

16 Additionally, where a majority stockholder wrongfully treats corporate assets as his own for  
17 borrowing purposes, wrongfully accepts unauthorized compensation in salaries and bonuses,  
18 wrongfully uses corporate funds for personal obligations and expenses, and allows irregularities in  
19 the keeping of the corporate books and records, such activities are clear breaches of fiduciary duty by  
20 such stockholder. 18A Am Jur 2d, Corporations § 778 (1985).

21 The defendants have repeatedly engaged in a course of conduct of distributing corporate  
22 funds, property and benefits to defendant McCann, Jr., Mrs. McCann and select third parties, all to  
23 the exclusion of plaintiff. Defendants authorized the use of corporate property for their own  
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1 purposes, borrowed corporate funds, and wrongfully accepted improper and unreasonable salaries in  
2 exchange for the performance of minimal or no services.

3 The defendants have also breached their fiduciary duties owed as majority shareholders by  
4 engaging in oppressive actions or conduct toward plaintiff as a minority shareholder. *See* 18 A Am  
5 Jur 2d, Corporations § 767 (1985). The word "oppressive" contemplates a continuing course of  
6 harsh, dishonest or wrongful conduct and a visible departure from the standards of fair dealing which  
7 inure to the benefit of the majority and to the detriment of the minority. *Id.*

8 To assist in the determination of whether certain conduct of the majority  
9 shareholders/directors is oppressive toward minority shareholders, a checklist is set forth in Section  
10 768 of Volume 18A of *American Jurisprudence 2d, Corporations*. The following facts present in this  
11 case are set forth in the checklist as elements of proof of oppressive conduct: (1) the nature of the  
12 corporation as a close corporation with the participation by shareholders in management; (2) the  
13 dominance of one person or faction in corporate affairs; (3) changes occurring since formation of the  
14 corporation such as the death of a shareholder, director or officer, and the development of personal  
15 animosities among shareholders; and (4) specific oppressive acts such as refusal to declare dividends,  
16 and siphoning off profits through excessive salaries, rents or interest.

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18  
19 Idaho courts specifically recognize the fiduciary responsibilities owed by the majority  
20 shareholders/directors to both the corporation and to shareholders. *See Weatherby v. Weatherby*  
21 *Lumber Co.*, 94 Idaho 504, 506, 492 P.2d 43, 45 (1972). In fact, the Idaho Supreme Court has had  
22 the opportunity to review facts nearly identical to those present in this case.

23 In Steelman v. Mallory, 110 Idaho 510, 716 P.2d 1282 (1986), plaintiff and the two  
24 defendants were equal shareholders and directors in a closely held corporation. The defendants  
25 combined their votes to terminate plaintiff's employment, double the hourly wages paid to  
26

1 themselves, and take other action to personally benefit themselves, the majority  
2 shareholders/directors, to the exclusion of the minority shareholder/director. The minority  
3 shareholder/director filed suit alleging defendants breached their fiduciary duties by appropriating to  
4 themselves the funds and business of the Corporation. The gravamen of the plaintiff's complaint was  
5 that the majority shareholders/directors were attempting to "squeeze him out." *Id.* at 1285. In ruling  
6 in the plaintiff's favor, the court explained that the fact that directors of a closely held corporation  
7 owe a fiduciary duty to the minority shareholders is well recognized. *Id.*, quoting O'Neal, *Close*  
8 *Corporations* § 8.07 (2d ed.).

9 This case, as in *Steelman*, involves a closely held corporation wherein defendants McCann, Jr.  
10 and Meisner, majority shareholders/directors, have sought to appropriate for themselves the funds of  
11 the Corporation and to "squeeze out" the plaintiff, the third minority shareholder. McCann Ranch &  
12 Livestock Co. has been valued at approximately \$10,000,000. However, for the last three years,  
13 plaintiff, a 36.7% shareholder, has received less than \$500 of benefits from the Corporation. During  
14 this same period, defendant McCann, Jr. has received in excess of \$300,000 of benefits in the form of  
15 excessive salaries, improper use of corporate property, funds and corporate employees, and other  
16 transactions improperly benefiting defendant McCann, Jr., his family and his friends. Also, in  
17 furtherance of their scheme to deny plaintiff any benefits from the Corporation, defendants continue  
18 to reduce corporate income by authorizing expenditures to the majority shareholders and select third  
19 parties thinly disguised as "consultant's fees," "deferred compensation," "lease payments" and  
20 "loans."

21 The Amended Complaint clearly articulates how defendants McCann, Jr. and Meisner, as  
22 majority shareholders, directors and an officer of the Corporation have, in bad faith, engaged in a  
23 continuing course of conduct, through the exercise of their majority control and domination of the  
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1 Corporation and self-dealing, to conspire to deny plaintiff the right to participate in the Corporation's  
2 management, and render plaintiff's interest in the Corporation virtually worthless. The injury  
3 plaintiff has suffered is a result of defendants' oppressive actions, and falls squarely within the kind  
4 of injury articulated by the Steelman court. Accordingly, plaintiff is entitled to continue the  
5 prosecution of his Amended Complaint.

6 3. Plaintiff is Entitled to Assert Individual Causes of Action and Such Causes of Action Should  
7 Not be Dismissed.

8 Plaintiff's complaint is amended not only to omit those corrective actions undertaken since  
9 the filing of the original complaint, but also to make clear that the complaint alleges causes of action  
10 by which plaintiff has been injured in his individual capacity separate from those causes of action  
11 brought by plaintiff as a shareholder in a derivative proceeding. Plaintiff, in his individual capacity,  
12 is entitled to maintain his causes of action directly against defendants.

14 Idaho law specifically allows a minority stockholder in a closely held corporation to bring an  
15 action in his own right rather than in a derivative action, to allege wrongdoing by majority  
16 shareholders and directors. Steelman, 716 P.2d at 1285; *see also* Johnson v Gilbert, 127 Ariz. 410,  
17 412, 621 P.2d 916, 918 (1980). The derivative-direct distinction makes little sense when the only  
18 interested parties are two sets of shareholders, one who is in control and the other who is not. In this  
19 context, the debate over derivative status can become purely technical. *See* O'Neal & Thompson,  
20 O'Neal's Close Corporations, § 8.11 (3d ed. 1989).

22 In Steelman, the Idaho Supreme Court stated that "[t]he gravamen of [the plaintiff's]  
23 complaint is that the majority shareholders/directors were attempting to squeeze him out." Steelman,  
24 716 P.2d at 1285. This injury is sufficient to allow the plaintiff to bring his action against the  
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defendants in an individual capacity. Id. The court explained:

Since [the defendants], as directors of this small closely held corporation, had a fiduciary duty to [the plaintiff], as a minority shareholder, we cannot agree with appellants' contention that this case should have been dismissed because it is a "direct action" rather than a shareholder's derivative suit.

Id.

As set forth above, defendants McCann, Jr. and Meisner owed fiduciary duties to plaintiff as a minority shareholder. Similar to the defendants in Steelman, defendants McCann, Jr. and Meisner are attempting to "squeeze" plaintiff out of any role in the Corporation's management. As a result, plaintiff is entitled to assert individual causes of action against defendants, and such causes of action should not be dismissed.

4. Plaintiff's Complaint Should Not be Dismissed under I.C. § 30-1-744.

Defendant McCann Ranch & Livestock Co. asserts that plaintiff's derivative action should be dismissed pursuant to I.C. § 30-1-744. A derivative proceeding can be dismissed on the Corporation's motion pursuant to I.C. § 30-1-744, only if a determination is made in good faith after conducting a reasonable inquiry upon which conclusions are based, that the maintenance of the derivative proceeding is not in the best interests of the Corporation.

A panel of independent persons has not been appointed by the court. Therefore, the good faith determination that the derivative proceeding is not in the Corporation's best interest must be made by one of the following persons:

(a) A majority of independent directors present at a meeting of the board of directors if the independent directors constitute a quorum; or

(b) A majority of a committee consisting of two or more independent directors appointed by majority vote of independent directors present at a meeting of the board of directors, whether or

not such independent directors constituted a quorum.

I.C. § 30-1-744.

Defendant asserts that a reasonable inquiry of plaintiff's allegations and a good faith determination were made during a September 6, 2000 special meeting of the board of directors. Interestingly, this so-called reasonable inquiry and good faith determination took place only after defendants combined their shareholder votes to remove plaintiff from the board of directors. The sole purpose of removing plaintiff as a director was to preclude plaintiff's participation in the inquiry and determination, and therefore circumvent plaintiff's attempts to correct improper corporate actions by means of this derivative proceeding. This conduct alone demonstrates that defendants made no attempt to conduct a reasonable inquiry and an independent determination. If the majority shareholders and directors are able to easily circumvent the derivative action procedure as defendants attempt to do so here, the entire purpose underlying derivative proceedings would be of no effect.

Defendant also asserts that the remaining uncorrected issues raised in plaintiff's suit were of a de minimis nature and therefore not in the best interests of the Corporation to pursue in the derivative proceeding. Plaintiff's amended complaint alleges the uncorrected and improper corporate actions of excessive salary to defendant McCann, Jr., payments to Mrs. McCann for the rental of her garage at an amount exceeding \$106,000, reimbursement for fees and costs to defendants McCann, Jr. and Meisner to correct improper corporate acts, failure to reimburse the Corporation for the damages caused to the Corporation after correction of the now admitted improper acts, and failure to seek reimbursement to the Corporation for a receivable from the estate of Mr. McCann, Sr. in the amount of \$87,869.12. If properly addressed and corrected, these corporate actions would result in a recovery of nearly \$400,000 of the Corporation's funds. This amount is certainly not de minimus, and a truly independent director would recognize the importance of plaintiff's derivative action.

1 — Additionally, defendant argues that the so-called reasonable inquiry and good faith  
2 determination was made by a majority of independent directors in a meeting where the independent  
3 directors constituted a quorum. Although defendants successfully excluded plaintiff from their  
4 inquiry and determination, they were unable to procure a majority vote or quorum of independent  
5 directors.

6 Defendants' inquiry and determination was made only with the attendance and vote of  
7 defendants McCann, Jr. and Meisner. Defendants McCann, Jr. and Meisner are not independent  
8 directors. Defendants McCann, Jr. and Meisner are long-time friends, and have repeatedly combined  
9 their voting power in order to dominate and control the Corporation and produce substantial  
10 corporate distributions and other benefits for the majority shareholders to the exclusion of plaintiff,  
11 the minority shareholder. Defendants' combining of their votes to remove plaintiff from the board of  
12 directors and the subsequent attempt to terminate this derivative action is yet another example of  
13 defendants' improper conduct.

14 As set forth above, defendants have engaged in majority control, domination, and self-  
15 dealing. All of defendants' conduct undertaken on behalf of the Corporation is therefore governed by  
16 the intrinsic fairness standard. *See Re Reading Co.*, 551 F.Supp. at 1215. Defendants therefore have  
17 the burden of demonstrating the intrinsic fairness that a reasonable inquiry was conducted and a good  
18 faith determination was made as required by I.C. § 30-1-744. *Burton*, 583 F.Supp. at 416.

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21 5. Plaintiff's Action Against Gary E. Meisner Should Not be Dismissed.

22 Defendant Meisner is the Trustee of the McCann Trust and in such capacity exercises the  
23 powers of a shareholder and director of the Corporation. Defendant Meisner has repeatedly  
24 combined his shareholder and director voting power with that of defendant McCann, Jr., and  
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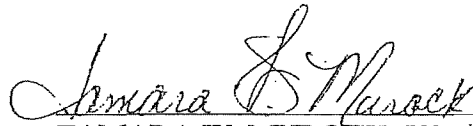
therefore owes fiduciary duties to the Corporation and to plaintiff as a minority shareholder. See  
1 Weatherhead v. Griffin, 123 Idaho 697, 702, 851 P.2d 993, 998 (1992); Steelman, 110 Idaho at 512.  
2

3 It is only with defendant Meisner's assistance that defendant McCann, Jr. has successfully  
4 controlled and dominated the Corporation to appropriate corporate funds for the majority  
5 shareholders and "squeeze out" the plaintiff. The Amended Complaint clearly sets forth defendant  
6 Meisner's actions in conspiring with defendant McCann, Jr. to deny plaintiff participation in the  
7 Corporation's management, and to render plaintiff's corporate interest virtually worthless. Defendant  
8 Meisner's actions are therefore suspect and subject to rigorous scrutiny. See Pepper, 308 U.S. at 306.  
9 Plaintiff is entitled to continue this action against defendant Meisner.  
10

#### 11 IV. CONCLUSION

12 After a review of plaintiff's Amended Complaint and viewing all inferences from the record  
13 in plaintiff's favor, plaintiff's Motion to Amend Complaint should be granted, and plaintiff's  
14 Amended Complaint should not be dismissed.

15 DATED this 1st day of November, 2000.  
16

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18   
19 TAMARA W. MUROCK, ISB #5886  
20 MARIS BALTINS, WSBA 09107  
21 WINSTON & CASHATT  
22 Attorneys for Plaintiff  
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25  
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# CERTIFICATE OF SERVICE

I hereby certify that, on the 14 day of November, 2000, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

Mr. Merlyn W. Clark  
Hawley Troxell Ennis & Hawley  
877 Main Street, Suite 1000  
P. O. Box 1617  
Boise, ID 83701-1617

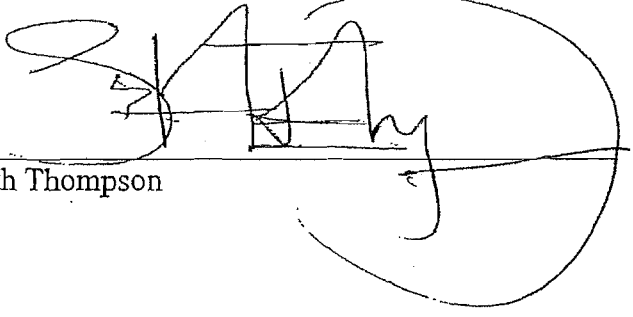
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Seth Thompson

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11 Telephone: (509) 838-6131  
12 Attorneys for Plaintiff

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DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

12 RONALD R. McCANN, individually and )  
13 as a shareholder of McCANN RANCH & )  
14 LIVESTOCK CO., )

15 Plaintiff,

16 vs.

17 WILLIAM V. McCANN, JR., as an )  
18 officer, director and shareholder of )  
19 McCANN RANCH & LIVESTOCK CO., )  
20 GARY E. MEISNER, as a director and )  
21 shareholder of McCANN RANCH & )  
22 LIVESTOCK CO., and McCANN )  
23 RANCH & LIVESTOCK, CO., an Idaho )  
24 Corporation, )

25 Defendants. )

No. CV 00-01111

AMENDED COMPLAINT  
FOR DAMAGES FOR RECOVERY  
OF CORPORATE PROPERTY,  
BREACH OF FIDUCIARY DUTIES,  
NEGLIGENCE, CONVERSION, SELF-  
DEALING, AND CONFLICTING  
INTEREST TRANSACTIONS

Plaintiff complains of defendants and alleges as follows:

EXHIBIT

"A"

I

JURISDICTION AND VENUE

1.1 The causes of action arise in Nez Perce County, Idaho, in that all the acts and transactions constituting alleged breaches involve directors, shareholders, and officers of McCann Ranch & Livestock Co. (the "Corporation"), an Idaho corporation doing business in Nez Perce County, Idaho.

1.2 This action is not a collusive one to confer jurisdiction on a court of the state of Idaho which it would not otherwise have.

II

PARTIES

2.1 At all relevant times, plaintiff was an individual residing in Nez Perce County, Idaho, and a 36.7% shareholder of the Corporation.

2.2 At all relevant times, defendant William V. McCann, Jr. was an individual residing in Nez Perce County, Idaho, and a director, officer and 36.7% shareholder of the Corporation.

2.3 At all relevant times, defendant Gary E. Meisner was a director of the Corporation.

2.4 At all relevant times, defendant Gary E. Meisner was also the trustee of The William V. McCann, Sr. Stock Trust, which is a 26.6% shareholder of the Corporation.

2.5 At all relevant times, defendant McCann Ranch & Livestock, Co. was a corporation duly authorized to conduct business in the state of Idaho, with its principal place of business in Nez Perce County, Idaho.

2.6 Plaintiff has standing in this matter because he was a shareholder at the time of the alleged wrongful actions, and fairly and adequately represents the interests of the shareholders or



1 members similarly situated in enforcing the rights of the Corporation.

2 2.7 Plaintiff served written demand upon the Corporation's board of directors to take  
3 suitable action to correct those corporate matters of which plaintiff complains.

4 2.8 Although some of the improper acts were corrected, substantial improper corporate  
5 acts remain uncorrected.

6  
7 2.9 Plaintiff brings this action individually against all defendants. Additionally, plaintiff  
8 brings this action as a derivative action on behalf of the shareholders and the Corporation pursuant to  
9 Idaho Code §§ 30-1-740 through 30-1-746.

10  
11 III

12 GENERAL ALLEGATIONS

13 3.1 Plaintiff and defendant William V. McCann, Jr. are the children of Anna Gertrude  
14 McCann ("Mrs. McCann") and William V. McCann, Sr., deceased.

15 3.2 Beginning in 1974, the year of incorporation of McCann Ranch & Livestock Co., and  
16 extending through 1977, Mrs. McCann and William V. McCann, Sr. gifted equal shares of 36.7% of  
17 the Corporation's stock to plaintiff and defendant William V. McCann, Jr.

18 3.3 Since the incorporation, plaintiff performed various services for the Corporation.  
19 Plaintiff hauled cattle and hay, constructed roads, performed general maintenance duties on company  
20 equipment and performed other kinds of manual labor.

21 3.4 Defendant William V. McCann, Jr. attended the University of Idaho Law School and  
22 since 1969 has practiced law in the State of Idaho.

23 3.5 Defendant William V. McCann, Jr. advised William V. McCann, Sr. as to matters  
24 involving his estate planning and the preparation of his Last Will and Testament.

25 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS  
26

1                                    **Excessive Compensation to William V. McCann, Jr.**

2            3.6    Beginning some time in the early 1990's, William V. McCann, Sr. began to  
3 separately compensate defendant William V. McCann, Jr. for legal services performed on behalf of  
4 the Corporation. Plaintiff is informed and believes and thereon alleges, that during this period,  
5 defendant William V. McCann, Jr. was engaged in the full-time practice of law.  
6

7            3.7    During 1997, the year of William V. McCann, Sr.'s death, defendant William V.  
8 McCann, Jr. received total compensation of \$58,000 from the Corporation.

9            3.8    After William V. McCann, Sr.'s death, defendant William V. McCann, Jr. took  
10 control of the Corporation, and despite plaintiff's repeated protests, excluded plaintiff from  
11 participating in its operations.  
12

13           3.9    After William V. McCann, Sr.'s death, defendant William V. McCann, Jr. caused his  
14 compensation to be increased to \$144,000 per year, effective May 1, 1999.

15           3.10   Plaintiff is informed and believes, and thereon alleges, that defendant William V.  
16 McCann, Jr. has represented that he devotes approximately 50% of his time to handling the  
17 Corporation's business.  
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19           3.11   The Corporation's business currently consists of leasing eleven commercial properties  
20 on long-term triple-net leases requiring little management. The company also includes five ranches,  
21 four of which are used for grazing purposes. The fifth ranch involves holding unimproved property.  
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23           3.12   Defendant William V. McCann, Jr.'s current salary from the Corporation is  
24 unreasonable, and merely a scheme to receive corporate benefits without including the other  
25 shareholders.  
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1           3.21   The Corporation has not sought repayment of the \$87,869.12 receivable from the  
2   estate of William V. McCann, Sr.

3           3.22   The failure of the Corporation to seek repayment of the \$87,869.12 receivable is not  
4   in the best interests of the Corporation or plaintiff.

5                           **Improper Loans to the Estate of William V. McCann**

6           3.23   The Will authorizes defendant Gary E. Meisner, as trustee, to redeem shares of the  
7   Corporation's stock to pay estate and inheritance taxes due at the time of Mr. McCann, Sr.'s death.

8           3.24   Plaintiff is informed and believes, and thereon alleges, that at the time of Mr.  
9   McCann, Sr.'s death, the estate owed United States Estate Tax in the amount of \$167,384, and Idaho  
10   Estate Tax in the amount of \$32,994.

11           3.25   The funds to pay the taxes were not obtained from a redemption of the Trust's stock  
12   as authorized by William V. McCann, Sr.'s Will.

13           3.26   Defendants William V. McCann, Jr. and Gary E. Meisner, in their positions as  
14   directors, shareholders and an officer, caused the Corporation to loan in excess of \$255,792 to the  
15   estate for the payment of the Estate of William V. McCann, Sr.'s estate and inheritance taxes.

16           3.27   The loan from the Corporation to the estate of William V. McCann, Sr. was made to  
17   prevent a depletion of defendant William V. McCann, Jr.'s future interest in the stocks held in the  
18   Trust.

19           3.28   The loan in excess of \$255,792 to the estate of William V. McCann, Sr. for the  
20   payment of estate and inheritance taxes was not in the best interests of the Corporation or plaintiff.  
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1                   **Improper Loans, Fees and Rental Payments to Mrs. A. Gertrude McCann**

2           3.29    The Will directs defendant Gary E. Meisner, as trustee, to vote the Trust's stock so as  
3   to create an income insofar as possible for the Trust's primary beneficiary, Mrs. McCann.

4           3.30    Plaintiff is informed and believes, and thereon alleges, that since the death of William  
5   V. McCann, Sr. and throughout the term of the Trust's administration, the Trust's primary  
6   beneficiary, Mrs. McCann, has been in need of trust income.

7           3.31    Income for Mrs. McCann has not been obtained by redemption of the corporate stock  
8   as authorized by William V. McCann, Sr.'s Will.

9           3.32    In an effort to prevent a depletion of defendant William V. McCann, Jr.'s future stock  
10   ownership, defendants William V. McCann, Jr. and Gary E. Meisner, in their positions as directors,  
11   shareholders and an officer, committed the following acts:

12           (a)    Defendants caused the Corporation to loan in excess of \$81,000 to Mrs.  
13   McCann in the form of an Officer's Account Receivable;

14           (b)    Beginning on December 28, 1998, defendants caused the Corporation to pay a  
15   wage to Mrs. McCann under the guise of a "consultant's fee" in the amount of \$48,000 per  
16   year;

17           (c)    On May 1, 1999, defendants caused the Corporation to pay to Mrs. McCann a  
18   "consultant bonus" in the amount of \$17,325;

19           (d)    On September 6, 2000, defendants attempted to cause the Corporation to pay  
20   "deferred compensation" to Mrs. McCann; and  
21

1 (e) On September 6, 2000, defendants caused the Corporation to lease Mrs.  
2 McCann's personal garage for back rental payments for 12-1/2 years for a rental amount in  
3 excess of \$106,000.

4 3.33 Plaintiff is informed and believes, and thereon alleges, that no contract was ever  
5 executed with Mrs. McCann regarding the alleged consulting services provided to the Corporation in  
6 exchange for the "consulting fee."  
7

8 3.34 Plaintiff is informed and believes, and thereon alleges, that Mrs. McCann is not  
9 required to keep a record of hours worked, nor services performed in connection with her  
10 "consulting services."  
11

12 3.35 Plaintiff is informed and believes, and thereon alleges, that Mrs. McCann is currently  
13 84 years old, and has not provided any substantive services to the Corporation as a "consultant" in  
14 exchange for the "consulting fee."

15 3.36 The actions of defendants William V. McCann, Jr. and Gary E. Meisner, set forth in  
16 paragraph 3.32 above were improper corporate acts.  
17

18 3.37 The actions of defendants William V. McCann, Jr. and Gary E. Meisner, set forth in  
19 paragraph 3.32 above were not in the best interests of the Corporation or plaintiff.  
20

#### 21 Other Improper Acts

22 3.38 Plaintiff is informed and believes, and thereon alleges, that defendants, in their  
23 capacities as directors, shareholders, and an officer of the Corporation:

24 (a) Improperly caused the expenditure of substantial corporate funds for the  
25 purchase of vehicles, insurance, and other gifts, and the payment of excess compensation and  
26

1 other benefits for defendant William V. McCann, Jr., his family and his friends, all of which  
2 were not properly payable;

3 (b) Improperly caused the use of corporate employees and property for the  
4 personal benefit of defendant William V. McCann, Jr., his family and his friends; and

5 (c) Entered into various other transactions improperly benefiting defendant  
6 William V. McCann, Jr., his family and his friends.  
7

8 3.39 Plaintiff identified such improper expenditures, use and payment of corporate  
9 employees and property, and various other transactions improperly benefiting defendant William V.  
10 McCann, Jr., his family and his friends, in detail to the Corporation's board of directors prior to  
11 filing the Complaint. True and correct copies of the written demand letters of September 13, 1999,  
12 December 6, 1999, January 21, 2000 and June 9, 2000 are attached as Exhibit "B." The board  
13 addressed the issue of excess compensation on August 9, 2000 and September 6, 2000, but failed to  
14 take complete corrective action. The board also addressed and prospectively corrected some of the  
15 violations regarding the improper use of corporate employees and property, and various other  
16 improper transactions, but took no action to recover damages caused to the Corporation by such  
17 improper acts and transactions.  
18  
19

20 3.40 Plaintiff is informed and believes, and thereon alleges, that defendants caused the  
21 Corporation to enter into various logging contracts for the logging of timber on corporate property,  
22 and that such logging is substantially depleting the value of the property. Despite plaintiff's repeated  
23 protests, and defendants' assurances that the logging would be suspended, defendants caused the  
24 logging to continue to the detriment of the Corporation and plaintiff. See Exhibit "B."  
25  
26

1                                    **Plaintiff's Demands to the Corporation and Defendants' Responses**

2            3.41    The plaintiff made numerous efforts to prevent the Corporation's continued  
3            engagement in the above-described improper and illegal conduct, including but not limited to, oral  
4            and written demands made by plaintiff's counsel upon the Corporation by and through the  
5            Corporation's attorney, Cumer L. Green. See Exhibit "B."

6  
7            3.42    Only after the original filing of plaintiff's Complaint did defendant William V.  
8            McCann, Jr. inform plaintiff by letter dated August 7, 2000, that the Corporation recovered funds  
9            from the estate of William V. McCann, Sr. in the amount of \$286,928.32. This was disclosed  
10           immediately prior to the hearing on defendants' motions to dismiss on August 8, 2000, and  
11           confirmed at the board of directors meeting on August 9, 2000.

12  
13           3.43    On August 9, 2000, at a board of directors meeting of the Corporation, defendant  
14           William V. McCann, Jr. presented a letter dated August 9, 2000, which addressed many of the  
15           improper corporate activities identified by plaintiff and admitted that errors had been made and  
16           corrective action would be taken.

17  
18           3.44    During the August 9, 2000 board of directors meeting, defendant William V.  
19           McCann, Jr. agreed, as president of the corporation, to take the following corrective actions:

20                    (a)    The Corporation would recover corporate funds in the amount of \$286,928.32  
21                    from the Trust.

22                    (b)    A committee would be appointed to investigate past and present compensation  
23                    of family members. Plaintiff requested he be appointed to this committee and defendant  
24                    William V. McCann, Jr. agreed to consider this request, but eventually denied plaintiff a role  
25                    in the investigation.  
26



1 (c) The Corporation would identify and seek reimbursement for improper  
2 expenditures of corporate funds for excessive salaries, purchase of vehicles, insurance,  
3 services and other gifts to defendant William V. McCann, Jr. or his family or friends.

4 **Defendants' Continuing Improper Acts**

5  
6 3.45 After defendant William V. McCann, Jr. presented the letter to the board and  
7 promised to take corrective action, he then submitted a letter to the board requesting reimbursement  
8 and indemnification for costs and fees relating to the lawsuit. Defendant Gary E. Meisner submitted  
9 a similar request for indemnification. Each defendant then voted in favor of the other's  
10 reimbursement. Plaintiff voted against both reimbursements. The reimbursement of costs to correct  
11 admittedly improper acts are further improper payments to defendants.  
12

13 3.46 On September 6, 2000, after plaintiff successfully caused the repayment of  
14 \$286,928.32 owed by the estate of William V. McCann, Sr. to the Corporation, plaintiff was  
15 removed from the board of directors by the combined votes of defendants William V. McCann, Jr.  
16 and Gary E. Meisner, at a special meeting of shareholders convened by defendants for that purpose.  
17

18 3.47 Following the September 6, 2000 special shareholders meeting and plaintiff's  
19 removal from any further voice as a board member, the new board of directors, now controlled by  
20 defendants William V. McCann, Jr. and Gary E. Meisner, took the following actions:

21 (a) Confirmation of defendant William V. McCann, Jr.'s salary at \$12,000 per  
22 month.  
23

24 (b) Devising a new plan to distribute money to Mrs. McCann without redeeming  
25 the Trusts' stock. The new plan consisted of paying Mrs. McCann \$106,000 for 12-½ years  
26 back rent for the use of her garage. This distribution of \$106,000 was the culmination of two

1 earlier attempts to funnel money out of the Corporation to Mrs. McCann, circumventing the  
2 authorization in Mr. McCann, Sr.'s Will to redeem the shares held for Mrs. McCann's benefit  
3 in trust. The two earlier attempts, payment of a "consulting fee" and payment of "deferred  
4 compensation," were both recognized as improper and defeated through plaintiff's efforts.

5  
6 **Defendants' Continuing Oppression of Plaintiff as a Minority Shareholder**

7 3.48 Plaintiff is informed and believes, and thereon alleges, that defendant William V.  
8 McCann, Jr. has, through manipulation of his friends and advisors, orchestrated the operations of the  
9 Corporation to result in maximum benefits to himself, Mrs. McCann, and selected third parties, with  
10 no benefit of stock ownership to plaintiff, all in breach of his duty of good faith and fair dealing  
11 owed as a controlling officer, director and shareholder to plaintiff, as a minority shareholder.

12  
13 3.49 Defendants William V. McCann, Jr. and Gary E. Meisner together constitute majority  
14 control and domination of the corporate operations of the Corporation.

15 3.50 Plaintiff is informed and believes, and thereon alleges, that defendants William V.  
16 McCann, Jr. and Gary E. Meisner are long-time friends, and have engaged in a pattern of self-  
17 dealing intended to confer corporate benefits upon William V. McCann, Jr., Mrs. McCann, and  
18 selected third parties to the exclusion of plaintiff as minority shareholder.

19  
20 3.51 Plaintiff is informed and believes, and thereon alleges, that defendants William V.  
21 McCann, Jr. and Gary E. Meisner conspired between themselves and others to deprive plaintiff of  
22 any voice in the management of the Corporation's affairs.

23  
24 3.52 Plaintiff is informed and believes, and thereon alleges, that defendants William V.  
25 McCann, Jr. and Gary E. Meisner have engaged in a course of conduct intended to oppress plaintiff  
26 and render plaintiff's interest in the Corporation virtually worthless.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

1           3.53 Plaintiff is informed and believes, and thereon alleges, that defendant William V.  
2 McCann, Jr. has used his position and legal knowledge as an attorney in conjunction with defendant  
3 Gary E. Meisner, to engage in an oppressive course of conduct toward plaintiff as a minority  
4 shareholder of the Corporation.  
5

6           3.54 Over the last three years, since the death of William V. McCann, Sr., defendant  
7 William V. McCann, Jr., a 36.7% shareholder, has received distributions of money and other benefits  
8 from the Corporation in an amount exceeding \$300,000.  
9

10           3.55 During the same three-year period, plaintiff, also a 36.7% shareholder, has received  
11 total distributions of money or other benefits from the Corporation of less than \$500.  
12

13           3.56 The Corporation has declared no dividends during the preceding three (3) year period.  
14

15           3.57 The Corporation has conducted no annual shareholder meeting for almost two (2)  
16 years.  
17

18           3.58 The defendants, in their capacities as corporate directors, majority shareholders, and  
19 an officer, have acted in bad faith and have failed to correct all identified improper acts.  
20

21           3.59 Despite the decision of the Corporation's board of directors to remedy those improper  
22 actions of which plaintiff complained, the following specific acts remain uncorrected and constitute  
23 breaches of fiduciary duty, negligence, conversion, self-dealing and conflicting interest transactions  
24 to the Corporation and plaintiff as a minority shareholder:  
25

26           (a) Excessive salary to defendant William V. McCann, Jr.;

          (b) Payments exceeding \$106,000 to Mrs. McCann for the rental of her garage;

          (c) Reimbursement for fees and costs to defendants William V. McCann, Jr. and

Gary E. Meisner to correct improper corporate acts;

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

LAW OFFICES OF *167*  
*Winston & Cashatt*  
200 NORTH WEST BLVD. SUITE 1000  
FORT WORTH, TEXAS 76102

1 (d) Failure to reimburse the Corporation for the damages caused to the  
2 Corporation after correction of the now admitted improper acts;

3 (e) Failure to seek reimbursement to the Corporation for a receivable from the  
4 estate of William V. McCann, Sr. in the amount of \$87,869.12; and

5 (f) The removal of plaintiff as a member of the board of directors of the  
6 Corporation.  
7

8 3.60 Further demands upon the Corporation to remedy the above-described acts of  
9 misconduct of which plaintiff complains is futile in that the defendants are directors of the  
10 Corporation and the cause of the Corporation's engagement in such misconduct, and despite  
11 plaintiff's repeated oral and written demands since the summer of 1999, the Corporation has failed to  
12 correct all improper acts.  
13

14 IV

15 FIRST CLAIM

16 Claim by Plaintiff as an Individual against Defendants

17 Breach of Fiduciary Duties

18 4.1 Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
19 through 3.60 above.

20 4.2 As majority shareholders, directors, and an officer of the Corporation, defendants owe  
21 plaintiff fiduciary duties.

22 4.3 The above-described actions and conduct of defendants William V. McCann, Jr. and  
23 Gary E. Meisner as majority shareholders, directors, and an officer, constitute oppressive conduct  
24 toward plaintiff as a minority shareholder.

25 4.4 The oppressive conduct of defendants William V. McCann, Jr. and Gary E. Meisner  
26 is burdensome, harsh and wrongful toward plaintiff as a minority shareholder of McCann Ranch &  
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

168  
LAW OFFICES OF

Winston & Cashatt

1 Livestock Co.

2 4.5 The conduct by defendants William V. McCann, Jr. and Gary E. Meisner constitutes a  
3 breach of fiduciary duty of good faith and fair dealing toward plaintiff as a minority shareholder.

4 4.6 As a proximate result of defendants' breach, the plaintiff has been damaged in an  
5 amount to be proven at trial.  
6

7 V

8 SECOND CLAIM

9 Claim by Plaintiff as an Individual against Defendants

10 Negligence

11 5.1 Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
12 through 4.6 above.

13 5.2 Defendants' above-described actions and conduct constitute breach of defendants'  
14 obligations under Idaho Code §§ 30-1-830 and 30-1-842, to discharge their duties as directors and as  
15 an officer in good faith, with the care an ordinarily prudent person in a like position would exercise  
16 under similar circumstances, and in a manner they reasonably believe to be in the best interests of the  
17 Corporation and plaintiff.

18 5.3 As a proximate result of defendants' breach, plaintiff has been damaged in an amount  
19 to be proven at trial.  
20

21 VI

22 THIRD CLAIM

23 Claim by Plaintiff as an Individual against Defendants

24 Conversion

25 6.1 Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
26 through 5.3 above.

1           6.2   Defendants' above-described actions and conduct constitute conversion of corporate  
2 funds and property for the personal benefit of defendant William V. McCann, Jr., his family, and his  
3 friends.

4           6.3   Defendants were unjustified in converting corporate funds and property for the  
5 personal benefit of defendant William V. McCann, Jr., his family, and his friends.  
6

7           6.4.   Plaintiff is rightfully entitled to his share of corporate funds and property converted in  
8 an amount to be proven at trial.

9  
10                               VII  
11                               FOURTH CLAIM  
12                               Claim by Plaintiff as an Individual against Defendants  
13                               Self-Dealing

14           7.1   Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1  
15 through 6.4 above.

16           7.2   As set forth above, defendants engaged in various actions and conduct, entered into  
17 various transactions on behalf of the Corporation, and otherwise utilized corporate funds and  
18 property for the purpose of personally benefiting defendant William V. McCann, Jr., his family, and  
19 his friends.

20           7.3   The above-described actions and conduct of defendants constitute a breach of  
21 defendants' duty to avoid self-dealing.

22           7.4   As a proximate result of defendants' breach, plaintiff has been damaged in an amount  
23 to be proven at trial.  
24  
25  
26

VIII  
FIFTH CLAIM  
Claim by Plaintiff as an Individual against Defendants  
Conflicting Interest Transactions

8.1 Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 through 7.4 above.

8.2 Defendants' above-described actions and conduct involve the commitment of the Corporation in transactions in which defendants, and/or related persons to defendants, have a conflicting interest.

8.3 At the time the above-described transactions were consummated by the Corporation, defendants knew that defendants and/or related persons were parties to the transactions, or that the transactions had beneficial financial significance to defendants and/or related persons, and that their interests would reasonably be expected to exert an influence on defendants' judgment in voting in their capacities as directors.

8.4 According to the circumstances at the time the above-described transactions took place, the transactions were not fair to the Corporation or plaintiff.

8.5 The above-described transactions were not approved by a majority of qualified directors or qualified shares as required by Idaho Code §§ 30-1-862 and 30-1-863, and are thereby ineffective.

8.6 The above-described transactions constitute breach of defendants' obligations under Idaho Code §§ 30-1-860 through 30-1-863.

8.7 As a proximate result of defendants' engagement in conflicting interests transactions, plaintiff has been damaged in an amount to be proven at trial.

IX  
SIXTH CLAIM  
Claim by Plaintiff in a Derivative Action against Defendants  
Breach of Fiduciary Duties

9.1 Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 through 8.7 above.

9.2 As shareholders, directors, and an officer of the Corporation, defendants owe the Corporation fiduciary duties.

9.3 Defendants' above-described actions and conduct constitute breach of the fiduciary duties owed by defendants to the Corporation.

9.4 As a proximate result of defendants' breach, the Corporation has been damaged in an amount to be proven at trial.

X  
SEVENTH CLAIM  
Claim by Plaintiff in a Derivative Action against Defendants  
Negligence

10.1 Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 through 9.4 above.

10.2 Defendants' above-described actions and conduct constitute breach of defendants' obligations under Idaho Code §§ 30-1-830 and 30-1-842, to discharge their duties as directors and as an officer in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner they reasonably believe to be in the best interests of the Corporation.

10.3 As a proximate result of defendants' breach, the Corporation has been damaged in an amount to be proven at trial.



XI  
EIGHTH CLAIM  
Claim by Plaintiff in a Derivative Action against Defendants  
Conversion

11.1 Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 through 10.3 above.

11.2 Defendants' above-described actions and conduct constitute conversion of corporate funds and property for the personal benefit of defendant William V. McCann, Jr., his family, and his friends.

11.3 Defendants were unjustified in converting corporate funds and property for the personal benefit of defendant William V. McCann, Jr., his family, and his friends.

11.4 The Corporation is rightfully entitled to corporate funds and property converted in an amount to be proven at trial.

XII  
NINTH CLAIM  
Claim by Plaintiff in a Derivative Action against Defendants  
Self-Dealing

12.1 Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 through 11.4 above.

12.2 As set forth above, defendants engaged in various actions and conduct, entered into various transactions on behalf of the Corporation, and otherwise utilized corporate funds and property for the purpose of personally benefiting defendant William V. McCann, Jr., his family, and his friends.

12.3 The above-described actions of defendants constitute a breach of defendants' duty to avoid self-dealing.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

12.4 As a proximate result of defendants' breach, the Corporation has been damaged in an amount to be proven at trial.

## XIII

TENTH CLAIM

### Claim by Plaintiff in a Derivative Action against Defendants

### Conflicting Interest Transactions

13.1 Plaintiff realleges and incorporates by reference the allegations of Paragraphs 1 through 12.4 above.

13.2 Defendants' above-described actions and conduct involve the commitment of the Corporation in transactions in which defendants, and/or related persons to defendants, have a conflicting interest.

13.3 At the time the above-described transactions were consummated by the Corporation, defendants knew that defendants and/or related persons were parties to the transactions, or that the transactions had beneficial financial significance to defendants and/or related persons, and that their interests would reasonably be expected to exert an influence on defendants' judgment in voting in their capacities as directors.

13.4 According to the circumstances at the time the above-described transactions took place, the transactions were not fair to the Corporation.

13.5 The above-described transactions were not approved by a majority of qualified directors or qualified shares as required by Idaho Code §§ 30-1-862 and 30-1-863, and are thereby ineffective.

13.6 The above-described transactions constitute breach of defendants' obligations under Idaho Code §§ 30-1-860 through 30-1-863.

1           13.7 As a proximate result of defendants' engagement in conflicting interests transactions,  
2 the Corporation has been damaged in an amount to be proven at trial.

3           WHEREFORE, plaintiff requests the following relief, the amount of which is alleged to be  
4 within the jurisdictional limit, against defendants, jointly and severally as follows:  
5

6           1. For an award for all compensatory damages caused by or arising from the defendants'  
7 conduct;

8           2. That a judgment be entered in favor of plaintiff in the amount to be proven at trial  
9 plus interest accruing with post judgment interest as allowed by law;

10           3. For the forfeiture of defendants' compensation received by the Corporation in an  
11 amount to be shown at the time of trial;

12           4. That, pursuant to Idaho Code § 30-1-809, defendants be removed as members of the  
13 board of directors of McCann Ranch & Livestock Co., based upon their continual violation of  
14 fiduciary duties to the Corporation and plaintiff, and oppressive acts committed in bad faith toward  
15 plaintiff as a minority shareholder;  
16

17           5. That, pursuant to Idaho Code § 30-1-1430(2)(b), McCann Ranch & Livestock Co. be  
18 ordered judicially dissolved based upon the oppressive conduct of the controlling  
19 shareholder/directors toward the minority shareholder which has caused and is causing irreparable  
20 damage to the Corporation;  
21

22           6. That plaintiff be awarded his attorneys' fees and costs incurred to bring this derivative  
23 action pursuant to Idaho Code § 30-1-746(1);  
24

25           7. That plaintiff be awarded his attorneys' fees and costs, as allowed under applicable  
26 law, including Idaho Code § 12-121; and

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

1 8. For such other and further relief as the Court deems just and proper.

2 DATED this \_\_\_\_ day of November, 2000.

3  
4  
5  
6 TAMARA W. MUROCK, IBA #5886  
7 MARIS BALTIMS, WSBA # 09107  
8 WINSTON & CASHATT

9 Attorneys for Plaintiff  
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1 VERIFICATION

2 STATE OF IDAHO )  
3 )ss.  
4 County of Nez Perce )

5 RONALD R. McCANN, being first duly sworn upon oath, deposes and says:

6 That he has read the above and foregoing Amended Complaint for Damages for Recovery of  
7 Corporate Property, Breach of Fiduciary Duties, Negligence, Conversion, Self-Dealing, and  
8 Conflicting Interest Transactions, knows the contents thereof, and believes the same to be true.  
9

10  
11 \_\_\_\_\_  
12 RONALD R. McCANN

13 SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of November, 2000.  
14

15 \_\_\_\_\_  
16 Notary Public in and for the State of  
17 Idaho, residing at \_\_\_\_\_  
18 My appointment expires \_\_\_\_\_  
19  
20  
21  
22  
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24  
25  
26

COPY

## LAST WILL AND TESTAMENT

OF

WILLIAM V. McCANN, SR.

I, WILLIAM V. McCANN, SR., a legal resident of Lewiston, Idaho, being of sound mind, do make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and codicils heretofore made by me.

Such revocation includes but is not limited to my Last Will and Testament executed on June 12, 1974, Codicil to my Last Will and Testament executed on December 3, 1974, my Last Will and Testament executed on October 29, 1985, First Codicil to my Last Will and Testament dated March 13, 1992, my Last Will and Testament executed on March 5, 1996.

## ARTICLE I.

I am married and my wife's name is ANNA G. McCANN. I hereby declare that on the date of execution of this Will I have the following children who are living:

WILLIAM VERN McCANN, JR., born [REDACTED] and

RONALD ROBERT McCANN, born [REDACTED]

*William V. McCann, Sr.*  
William V. McCann, Sr.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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EXHIBIT

That at the time of the execution of this Will, I have the following grandchildren:

MALINDA ANN McCANN, born [REDACTED]

WILLIAM VERN McCANN, III, born [REDACTED]

I have at the time of signing this Last Will and Testament two (2) great grandchildren who are only provided for herein through their parent MALINDA ANN McCANN.

#### ARTICLE II.

Each reference in this will to the children, descendants, or issue of myself or of any other person is intended to refer to and include only the lawful children, descendants or issue of such persons as well as lawfully adopted children.

#### ARTICLE III.

It is my desire and intention under this my Will and Testament to dispose of all my separate property and my share of the community property owned by myself and my wife.

#### ARTICLE IV.

I direct that all of my just debts and my funeral expenses be paid as soon as practicable after my death. In the event that any property or interest in property passing under this will or by operation of law or otherwise by reason of my death shall be encumbered by a mortgage or a lien or shall be pledged to secure

*William V. McCann, Sr.*

William V. McCann, Sr.

any obligation, it is my intention that such indebtedness shall not be charged to or paid from my estate but that the devisee, legatee, joint owner or beneficiary shall take such property or interest in property subject to all encumbrances existing at the time of my death.

ARTICLE V.

I direct that all estate, inheritance, transfer, legacy, succession, and other death taxes and duties of any nature payable by reason of my death which may be assessed or imposed upon or with respect to property passing under this will or property not passing under this will shall be paid out of my estate as an expense of administration and no part of said taxes shall be apportioned or prorated to any legatee or devisee under this will or any person owning or receiving any property, including life insurance, not passing under this will.

ARTICLE VI.

I hereby bequeath and devise specifically as follows:

Should my wife, ANNA G. McCANN, survive me then

To GARY MEISNER as TRUSTEE of the WILLIAM V. McCANN, SR. STOCK TRUST as provided for in Article VIII herein my 66,600 shares of common stock of McCann Ranch & Livestock Co., Inc., an Idaho corporation, which is my sole and separate property.

To my son, WILLIAM V. McCANN, JR.:

*William V. McCann, Sr.*  
William V. McCann, Sr.



One leather-backed rocking chair with leather  
seat and elk carving;

All phonographs and cabinets for said  
phonographs;

All my sleigh bells and school bells; and 1200

All my jewelry.

6000 / 7,600

Should my wife ANNA G. McCANN predecease me then to  
WILLIAM V. McCANN, JR. my 66,600 shares of common stock  
of McCann Ranch & Livestock Co., Inc., an Idaho  
corporation, which is my sole and separate property.

To my son, RONALD ROBERT McCANN:

My guns and rifles; and

2500

My player piano and all rolls for it. 1000 / 3500

To LARRY KENNEDY, son of DARLENE McCANN, wife of my son,  
RONALD ROBERT McCANN:

The sum of One Dollar (\$1.00) only.

If any of the individual beneficiaries named in this article  
shall not survive me, then the bequest or devise to such individual  
shall lapse and shall become part of my residuary estate and  
disposed of according to the provisions hereinafter contained.

#### ARTICLE VII.

I bequeath to my wife, ANNA G. McCANN, if living at my death,  
all of my clothing, automobiles, and all other tangible personal  
property not otherwise specifically bequeathed, owned by me at the  
time of my death. If my said wife shall not survive me, I bequeath

*William V. McCann, Sr.*  
William V. McCann, Sr.

all of the aforesaid property in equal shares to my children who shall be living at the time of my death.

ARTICLE VIII.

I hereby create the WILLIAM V. McCANN, SR. STOCK TRUST the trustee of which shall be GARY MEISER and he shall receive 66,600 shares of common stock in the McCann Ranch & Livestock Co., Inc., an Idaho corporation, which is my sole and separate property.

Said WILLIAM V. McCANN, SR. STOCK TRUST shall be held, managed, controlled and distributed as follows:

A. Upon my death the Trustee shall hold, manage and control the property comprising the Trust estate, collect the income therefrom, and out of the same shall pay all taxes and other incidental expenses of the Trust, and shall hold or distribute the Trust estate and any income therefrom as provided hereinafter. The Trustee is empowered to sell to the Corporation whatever shares of stock are necessary to enable my estate to pay the estate and inheritance taxes due at the time of my death. The Trustee shall vote the stock and it is my intention that such Trustee shall vote the stock so as to create an income insofar as possible for my wife, ANNA G. McCANN.

  
William V. McCann, Sr.

B. So long as the Trust continues, the Trustee shall pay to or apply for the benefit of my wife ANNA G. McCANN, so much of the income as Trustee in his discretion deems necessary for her support, care and maintenance. Any income not so distributed shall be accumulated and added to principal.

C. Upon the death of my wife, ANNA G. McCANN, the Trustee shall distribute the 66,600 shares of common stock plus any accumulated income to my son, WILLIAM V. McCANN, JR. It is my intention that if my son, WILLIAM V. McCANN, JR. survives myself and my wife that he shall be the sole owner of said 66,600 shares of common stock (or the remainder thereof) with all income therefrom to be his sole and separate property. In the event that my son shall predecease my wife, ANNA G. McCANN, then the stock shall be conveyed upon my death or the death of my wife, ANNA G. McCANN, should she survive me to GARY MEISNER as the TRUSTEE of the WILLIAM V. McCANN, SR. GRANDCHILDREN TRUST as provided for in Article X herein.

ARTICLE IX.

All the rest, residue and remainder of my estate, including all of my separate property, all of my own share of community property wheresoever situated (including property over which I have

*William V. McCann, Sr.*

William V. McCann, Sr.

a power of appointment); and all lapsed legacies and devisees, I bequeath and devise to my wife, ANNA G. McCANN, if she survives me. In the event my wife predeceases me, then I bequeath and devise said remainder to GARY MEISER the Trustee for the WILLIAM V. McCANN, SR. GRANDCHILDREN TRUST.

ARTICLE X.

Said WILLIAM V. McCANN, SR. GRANDCHILDREN TRUST shall be held, managed, controlled and distributed as follows: . . . . .

A. Upon my death the Trustee shall hold, manage and control the property comprising the Trust estate, collect the income therefrom, and out of the same shall pay all taxes and other incidental expenses of the Trust, and shall hold or distribute the Trust estate and any income therefrom as provided hereinafter. The Trustee is empowered to sell to the Corporation whatever shares of stock are necessary to enable my estate to pay the estate and inheritance taxes due at the time of my death.

B. So long as the Trust continues, the Trustee shall pay to or apply for the benefit of my grandchildren so much of the income and principal of the Trust as the Trustee in his discretion deems necessary for their support, care, maintenance and education (including college and postgraduate

*William V. McCann, Sr.*

William V. McCann, Sr.

study, so long as pursued to advantage by the beneficiary), after taking into consideration to the extent the Trustee deems advisable their independent income and other resources known to the Trustee (including the capacity for gainful employment of any beneficiary who has completed or is not pursuing his or her education). Any income not so distributed shall be accumulated and added to principal. In making these payments, the Trustee may pay more to or apply more for some beneficiaries than others, and distributions may be made to one or more beneficiaries to the exclusion of others, if the Trustee deems this necessary in light of the circumstances, the size of the Trust estate and the probable future needs of the beneficiaries. In addition, the Trustee may, if he deems it advisable, apply income and principal of the Trust for the support of the guardian of the beneficiaries to the extent that such enhances the quality of care of my grandchildren without endangering the fulfillment of the key objective of this Trust which is to provide for the care and education of my grandchildren.

C. After my youngest grandchild reaches the age of thirty-five (35) years, the Trustee shall make distributions of the net income of the Trust annually (commencing with the calendar year said birthday occurs) and the final distribution

*William V. McCann, Sr.*

William V. McCann, Sr.

of the Trust corpus shall be made when my youngest grandchild reaches the age of forty-five (45) years.

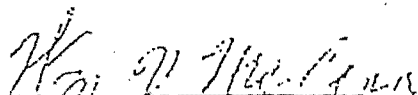
D. In the event any beneficiary should predecease me or predecease the termination of this Trust leaving issue surviving him or her, said beneficiary's share shall pass to said beneficiary's children who survive him or her, in equal shares.

E. In the event any beneficiary should predecease me or predecease the termination of this Trust leaving no issue surviving him or her, said beneficiary's share shall pass to those beneficiaries who survive me, in equal shares.

F. Should all the beneficiaries of the Trust predecease the termination of the Trust, then the Trustee shall distribute any remaining Trust estate to my children who have not predeceased the termination of the Trust.

G. All receipts and expenditures shall be administered by the Trustee, subject to any limitations stated elsewhere herein and allocated as to principal and income as provided in the Uniform Principal and Income Act, being Chapter 10 of Title 68, Idaho Code, as now in effect and as it may hereafter be amended.

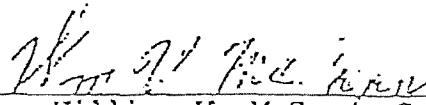
H. To carry out the purposes of the Trust created herein, and subject to any limitations stated elsewhere



William V. McCann, Sr.

herein, the Trustee is vested with all of the powers and authority as set forth in the Uniform Trustee's Powers Act, being Chapter 1 of Title 68, Idaho Code, as now in effect and as it may hereafter be amended.

The Trustee shall manage the Trust estate and may sell, exchange, lease for terms either within or beyond the duration of the Trust, lend, relend, invest and re-invest the Trust estate or any part thereof in any kind of property which men of prudence, discretion and intelligence exercise for their own account, specifically including, but not by way of limitation, acquisition of corporate obligations of every kind and preferred and common stocks. The Trustee shall have the same general powers that an individual being the absolute owner of real and personal property possesses not inconsistent with the purposes and intentions of the Trust. The Trustee is authorized to retain in the Trust, in the same form as that in which they were received by the Trustee, assets of any kind, and to continue and operate any business or interest therein which may be received hereunder as long as the same produces a reasonable income, and it appears to the best interest and advantage of the Trust estate.



William V. McCann, Sr.

I. In no event is said Trust to last longer than the period required pursuant to Section 55-111, Idaho Code, governing suspension of power of alienation.

ARTICLE XI.

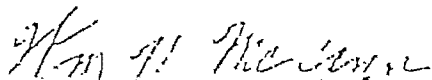
Should GARY MEISNER at any time be unable or unwilling to act as the Trustee of either or both the Trust(s), I hereby appoint CUMER L. GREEN as the Trustee of said Trust(s). If CUMER L. GREEN is unable or unwilling to act as such Trustee, I request that a Trustee be appointed by a court of competent jurisdiction.

ARTICLE XII.

If my wife and I, any other beneficiaries and I, or any primary and secondary beneficiary, die simultaneously or under such conditions that it cannot be determined from credible evidence which of us survived, the provisions made herein for my wife shall be construed as though she had survived me and my estate shall be distributed accordingly; any other person interested under this Will shall be deemed to have predeceased me; and, any secondary beneficiary shall be deemed to have predeceased the primary beneficiary.

ARTICLE XIII.

If any legatee, devisee, or taker under this Will shall interpose objections to its probate or in any other way contest it,



William V. McCann, Sr.



such person shall forfeit his or her entire interest under this Will and the gift, bequest or devise made to such person shall pass as part of the residue of my estate; provided, however, that if such person is a residuary beneficiary, his or her interest shall be divided proportionately among the remaining residuary beneficiaries.

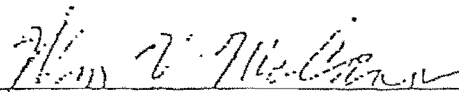
#### ARTICLE XIV.

I request that my Personal Representative employ WILLIAM V. MCCANN, JR., as attorney, not only in connection with the probate of my Will, but also in connection with any and all other matters of a legal nature relating to the administration of the estate. In the event WILLIAM V. MCCANN, JR. is unable or unwilling to act as attorney, then I request that the Personal Representative employ CUMER L. GREEN, Boise, Idaho as such attorney.

#### ARTICLE XV.

I hereby appoint my wife, ANNA G. MCCANN, to be the Personal Representative of this, my Last Will and Testament, and I direct that as such Personal Representative she not be required to execute a bond for the faithful performance of her duties.

In the event my wife shall predecease me, or shall fail for any reason to qualify as my Personal Representative, then in that event, I appoint my son, WILLIAM V. MCCANN, JR., of Lewiston, Idaho

  
William V. McCann, Sr.

as sole Personal Representative, to serve in such capacity without bond.

IN WITNESS WHEREOF, I subscribe my name this 1<sup>st</sup> day of May, 1996.

William V. McCann  
WILLIAM V. McCANN, SR.

The foregoing instrument, consisting of fourteen (14) pages, including the following page, was, on the date hereof, signed, published and declared by the above named Testator to be his Last Will and Testament, in the presence of us, who at his request and in his presence and in the presence of each other, and on the same date, have subscribed our names as witnesses thereto.

[Signature] residing at Boise, Idaho  
Sinda Fall residing at Moscow, Idaho

William V. McCann  
William V. McCann, Sr.

STATE OF IDAHO )

) ss.

County of Nez Perce )

We, WILLIAM V. McCANN SR., and Cumer, Green and LINDA FALL, the Testator and witnesses, respectively, whose names are subscribed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the Testator signed and executed said instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the Testator, signed the will as witness and to the best of his knowledge the Testator was at that time an adult, of sound mind and under no constraint or undue influence. --

William V. McCann Sr.  
WILLIAM V. McCANN SR., Testator

[Signature]  
Witness

Linda Fall  
Witness

SUBSCRIBED, SWORN to and acknowledged before me by WILLIAM V. McCANN SR. the Testator, and subscribed and sworn to before me by Cumer, Green and LINDA FALL witnesses, this 10th day of May, 1996.

Chantelle O. Horsing  
Notary Public for Idaho

Residing at Leamington

My commission expires 10-5-98

William V. McCann, Sr.

# Winston & Cashatt

L A W Y E R S

A PROFESSIONAL SERVICE CORPORATION

C. Matthew Andersen\*  
Beverly L. Anderson  
Maris Baltins  
Robert P. Beschel  
Richard L. Cease  
Bonnie L. Charney\*\*  
Patrick J. Cronin  
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Of Counsel,  
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Joseph J. Rekofke (1921 - 1997)  
Patrick H. Winston (1904 - 1996)

All members admitted in Washington  
\*Admitted in Idaho and Washington  
\*\*Admitted in California and Washington

September 13, 1999

Mr. Merlyn W. Clark  
Hawley Troxell Ennis & Hawley  
877 Main Street, Suite 1000  
P. O. Box 1617  
Boise, ID 83701-1617

Re: McCann Ranch and Livestock Co.  
Shareholders' Meeting

Dear Mr. Clark:

In response to your letter of August 27, 1999, this will confirm that we will attend the shareholders' meeting scheduled for September 29, 1999, at 10:00 a.m.

On behalf of Mr. Ron McCann, I again reiterate the request that no hunting or logging take place.

Please send me a copy of any "professionally designed" logging plan so that we may review it for the upcoming meeting.

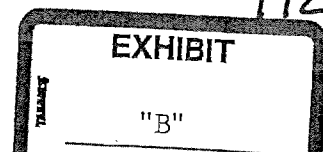
It is Mr. Ron McCann's opinion that any further logging will cause irreparable harm to the real property.

I look forward to our meeting on the 29<sup>th</sup> to discuss the division of the corporation.

Very truly yours,

MARIS BALTINS

MB:msj MEMORANDUM IN SUPPORT OF MOTION TO DISMISS  
cc: Mr. Ron McCann



# Winston & Cashatt

LAWYERS

A PROFESSIONAL SERVICE CORPORATION

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Marla Baltina  
Robert P. Baschel  
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All members admitted in Washington  
\* Additionally admitted in Idaho  
o Additionally admitted in California  
† Additionally admitted in Montana

December 6, 1999

Mr. Cumer L. Green  
Green Law Offices  
P. O. Box 2597  
1505 Tyrell Lane  
Boise, ID 83701-2597

Re: McCann Ranch & Livestock Company, Inc.

Dear Mr. Green:

I have preliminarily reviewed the materials supplied by you regarding the McCann corporation and hereby identify certain problems which when resolved would do much to foster the spirit of cooperation to divide the assets of the corporation as we discussed in our last meeting.

The concerns raised in your letter of November 18, 1999 were timely. I too have noticed and identified certain problems regarding the use of corporate assets and the payment of corporate property which, while so often practiced in the context of closely held corporations, must be avoided if we are to regard the corporation as a separate legal entity with primary allegiance to all its shareholders.

I have already raised this concern by suggesting that Mr. Ron McCann be paid a salary equal to his brother for the service he contributes to the welfare of the corporation. This idea was not accepted. We therefore must ask that all amounts paid to or for the benefit of all family members be done in the context of legitimate compensation or as a distribution on shares.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

A review of the tax returns over the last several years reveals that salaries were paid to certain individuals which should be treated as distributions on shares as opposed to legitimate

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Cumer L. Green  
December 6, 1999  
Page 2

A review of the Will of William V. McCann, Sr. reveals that he specifically provided that an income be created for Mrs. McCann from the trust left in his Will. The Will also provides that the Trustee is to sell (redeem) to the corporation shares of stock to enable the estate to pay the estate and inheritance taxes.

It appears that neither of these instructions of Mr. McCann, Sr. have been carried out.

The estate and Mrs. McCann are indebted to the corporation to the extent of \$256,000.00 and \$81,000.00 respectively. Instead of creating an income stream for Mrs. McCann through the appropriate means of redemption of shares, an improper and unsupportable consulting fee has been created which would result in substantial problems to the corporation if the income tax returns were audited by the Internal Revenue Service.

These are *ultra vires* acts which are improper under state and federal law and are counter to Mr. McCann, Sr.'s directions in his Will.

We are in the process of reviewing all of the properties and will make our selection of the desired properties known to you for the corporate division.

In the meantime, it is Mr. Ron McCann's request that the above mentioned problems be corrected so that the proper equity ownership of the corporation is reflected in the books and records.

As to the concerns raised in your letter of November 18, 1999, a more accurate recital of the facts may be that all family members, including Mr. William V. McCann, Jr.'s children, have repeatedly used corporate assets and in fact have had accidents with such assets that have resulted in substantial damage and detriment to the corporation. As we have discussed before, it probably would be best to concentrate on what we can do to correct the relationship between the brothers in the future as opposed to revisiting past perceived wrongs.

Thank you for your consideration of these matters.

Very truly yours,

MARIS BALTINS

MXB:stt

# Winston & Cashatt

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January 21, 2000

Facsimile Transmittal / U.S. Mail

Cumer L. Green  
Green Law Offices  
P.O. Box 2597,  
1505 Tyrell Lane  
Boise, ID 83701-2597

Re: McCann Ranch & Livestock Co.

Dear Mr. Green:

I was very disappointed to learn that Mr. Bill McCann has given direction to start logging the Forest Ranch after our discussion that such action is not legally required and after Mr. Ron McCann's repeated requests to cease logging on the property which he may wish to take into his corporation after the corporate split up.

In your January 12, 2000 letter it appears that Mr. Bill McCann is purposely using logging as a club to force Mr. Ron McCann into a premature settlement offer while Mr. Ron McCann does not have sufficient information to make an informed decision.

As you are aware, the total fair market value of McCann Ranch and livestock is likely to be in the fifteen million dollar (\$15,000,000.00) range and contains over eighteen (18) separate commercial and ranch properties.

Each of these properties must be investigated and reviewed so that Mr. Ron McCann makes a fully informed decision.

It is hereby urged to force Mr. Ron McCann into a quick decision when his brother has had the benefit of being involved in all details of the properties for at least the last fifteen (15) years.

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Cumer L. Green  
January 21, 2000  
Page 2

I appreciate your consent to allow Mr. Ron McCann's accountant and appraiser to have full access to all of the corporate books and records. Mr. Ron McCann's accountant will come to the corporate office on January 25, 2000 at 9:00 a.m.

In order to get this matter back on track toward resolution it is my request that you ask Mr. Bill McCann to get the loggers to cease their activities.

We will proceed in a reasonable manner to complete our investigation and present our offer for the split up as soon as such investigation is complete.

As we have discussed before, if we all act in good faith we should be able to accomplish a settlement of this matter.

Thank you for your consideration of this matter.

Very truly yours,

MARIS BALTINS

MXB:stt



# Winston & Cashatt

L A W Y E R S

A PROFESSIONAL SERVICE CORPORATION

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\*Additionally admitted in California  
\*Additionally admitted in Montana

June 9, 2000

## Facsimile Transmission & US Mail

Mr. Cumer L. Green  
Green Law Offices  
P. O. Box 2597  
1505 Tyrell Lane  
Boise, ID 83701-2597

Re: McCann Ranch & Livestock Co.

Dear Mr. Green:

Since December 1999, we have patiently waited for the corporation to take action to remedy those issues we have outlined as being serious violations of law and otherwise not in the best interests of the corporation. Despite our repeated attempts, however, the corporation has engaged in numerous tactics to delay the resolution of these matters.

As a result, this letter, in addition to those provided to you on behalf of the corporation on December 6, 1999 and January 21, 2000, serves as written demand pursuant to Idaho Code § 30-1-742 by Ron McCann upon the corporation to take suitable action to remedy the following illegal or improper acts of the corporation:

1. The loan in excess of \$337,000.00 made to the estate of Mr. William McCann, Sr. and Mrs. Gertrude McCann is an improper business use of corporate assets, and in light of the direction in Mr. William McCann, Sr.'s Will, the corporation shall seek the return of such funds, and redeem the company shares of the estate and Mrs. McCann.

## MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

2. Payments made to or on behalf of Mrs. Gertrude McCann as compensation or consulting fees are inappropriate whereas Mrs. Gertrude McCann provides no services to the

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Mr. Cumer L. Green

June 9, 2000

Page 2

provide an income stream to Mrs. McCann, the corporation shall seek reimbursement of such improper compensation, and redeem the shares of Mrs. McCann.

3. Payments by McCann Ranch & Livestock Co. for monthly inspection services by DBS have been inappropriately reflected on a Form 1099 as opposed to a W-2. In 1999, the Form 1099 reflects miscellaneous payments of \$19,476.00 to DBS. In 1998, the Form 1099 reflects payments of \$34,908.00 to DBS. The company checks were endorsed "DBS - Bill Skelton." Mr. Skelton was listed as the immediate supervisor of corporate employee Matt Albright in a Department of Labor Claim - Employer Separation Statement. The statement was signed by Matt Albright and Bill McCann, Jr. The corporation shall properly list Mr. Skelton as an employee, issue Forms W-2 to Mr. Skelton, and take immediate actions to pay the employment taxes associated with Mr. Skelton's employment.
4. Employees of McCann Ranch & Livestock Co. are being paid by the company to do work other than company work. Examples pertaining to this issue include:
  - a. Larry Watkins working at Garden City Apartments for 30 hours on one time card and 25 hours on another;
  - b. Matt Albright doing sewer work at 704 Castle Street which is owned by Lori McCann, for 43 hours on 8-12-99; and
  - c. Joe Heing doing sewer work at 704 Castle Street on company time.

The corporation shall immediately cease paying corporate employees for the performance of noncorporate work, and seek reimbursement for such payments from those individuals or entities who benefited from such use of corporate employees.

5. Company expenditures in 1999 at B&B Auto Brite were inappropriate corporate expenditures. Examples of this issue include:
  - a. Expenditures totaling \$234.35 made by William V. McCann, Jr. for his Mercedes;
  - b. Expenditures totaling \$181.30 made by Chantell Hoisington for her personal vehicle;
  - c. Expenditures totaling \$80.65 made by Gertrude McCann for her personal vehicles;
  - d. Expenditures totaling \$12.95 made by Jason Beck for his personal vehicle;
  - e. Expenditures totaling \$24.94 made by Aaron Beck for his personal vehicle;
  - f. Expenditures totaling \$12.95 made by Bill Skelton; and

- g. Expenditures totaling \$69.95 made by William V. McCann, III.

The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such payments from those individuals or entities who benefited therefrom.

6. Company expenditures at Brunel Tire and Auto Service Center were inappropriate corporate expenditures. Examples of this issue include:

- a. Expenditures totaling \$256.15 made by Howard Hoffman for his personal pickup;
- b. Expenditures totaling \$707.03 made by Gertrude McCann for her Honda, Mercedes and truck;
- c. Expenditures totaling \$23.05 made by William V. McCann, Jr. for his personal vehicle;
- d. Expenditures totaling \$459.46 made by William V. McCann III for a Mazda pickup;
- e. Expenditures totaling \$291.61 made by William V. McCann, Jr.'s stepson's vehicle;
- f. Expenditures totaling \$303.13 for a 1989 Ford Escort, license number 1L50910; and
- g. Expenditures totaling \$220.70 for a Toyota 4x4, license number N46992 owned by Casey and Company.

The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.

7. Company expenditures at Forest Auto Wrecking were inappropriate corporate expenditures. Examples of this issue include:

- a. Expenditures totaling \$417.50 for a Ford Escort engine and miscellaneous Probe parts;
- b. Expenditures totaling \$16.90 for a Mazda B2200 tailgate handle assembly;
- c. Expenditures totaling \$367.50 for a 1990 Toyota pickup transmission;

- e. Expenditures totaling \$78.75 for a 1984 Plymouth minivan quarter window; and
- f. Expenditures totaling \$131.25 for a Ford van rear bumper.

The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.

8. Company expenditures at Schrader's Truck and Auto Repair were inappropriate corporate expenditures. Examples of this issue include:

- a. Expenditures totaling \$260.54 for a 1991 Toyota 4x4;
- b. Expenditures totaling \$260.54 for a Mazda pickup;
- c. Expenditures totaling \$79.10 for a Ford van; and
- d. Expenditures totaling \$379.49 for a 1990 Ford pickup.

The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.

9. A corporate expenditure of \$120.00 at Master's Body Shop for work on a 1998 Chevy, license number N5332T was an inappropriate corporate expenditure. The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.
10. A corporate expenditure of \$92.40 at Auto Trim and Design for work on a 1998 Chevy, license number N5332T was an inappropriate corporate expenditure. The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.
11. A corporate expenditure of \$198.52 by William V. McCann III at Bann & Bann Auto Service was an inappropriate corporate expenditure. The corporation shall immediately cease expending corporate funds for noncorporate goods and services, and seek reimbursement for such expenditures from those individuals or entities who benefited therefrom.
12. The black stock truck owned by the company is being used for personal storage for William McCann, Jr. and thereby causing the company to incur additional expenses by hiring out the hauling of company livestock. The corporation shall immediately cease the use of corporate property for noncorporate use, and seek reimbursement for such use